

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

RECEIVED

Letitia H. Verdin, Circuit Court Judge

NOV 21 2014

Case No. 2011-CP-23-02028

S.C. Supreme Court

Precision Walls, Inc. Petitioner,

v.

Liberty Mutual Fire Insurance Co. Respondent.

APPENDIX

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

RECORD ON APPEAL

RECEIVED
JUL 10 2013

SC Court of Appeals

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FORM 4 CLERK OF COURT

GREENVILLE, SC
PAUL B. WICK

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2302028

2013 FEB 19 P 3:42

Precision Walls Inc

Liberty Mutual Fire
Insurance Co

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☒ Plaintiff ☒ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:

☐ See attached order; (formal order to follow)

☒ Statement of Judgment by the Court:

This matter is before the Court as a non-jury trial. The only issue before this Court is whether or not Precision Walls, Inc.'s insurance policy covers the costs associated with tearing down and replacing a brick wall in order to replace defective tape used by Precision Walls. Precision Walls maintains a Commercial General Liability insurance policy with Liberty Mutual which contains a "property damage" clause. This Court finds property damage to mean "physical injury to tangible property" pursuant to *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012). The property damage clause only applies if the damage is the result of an "occurrence." Based upon applicable statutes, case law, and arguments of counsel, this Court finds that the tearing down and replacing of the brick wall in order to replace faulty tape does not meet the definition of an occurrence. Further, this Court finds that Exclusion 2(j)(6) of the policy (which coverage for costs incurred as the result of faulty workmanship) excludes property damage coverage in this case. Therefore, this Court rules in favor of the Defendants and denies coverage to the Plaintiff.

formal order in accordance with this
for order

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)

ENTERED COMPUTER

This order ☒ ends ☐ does not end the case.

ORDER INFORMATION

Additional Information for the Clerk:

INFORMATION FOR THE JUDGMENT INDEX		
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.		
Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2162
Judge Code

2/12/13
Date

For Clerk of Court Office Use Only

This judgment was entered on 2/13/13, and a copy mailed first class or placed in the appropriate attorney's box on 2/18/13 to attorneys of record or to parties (when appearing pro se) as follows:

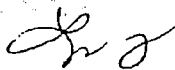
Charles Harry McDonald PO Box 944 Columbia, SC 29202

ATTORNEY(S) FOR THE PLAINTIFF(S)

Steven Wayne Ouzts Turner, Padgett, Graham & Laney, P.A.
P.O. Box 1473 Columbia, SC 29202
Joshua Daniel Shaw PO Box 1473 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)



STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FORM 4
FILED CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENSIMER

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2011CP2302028

2013 APR 10 A 10:37

Precision Walls Inc

Liberty Mutual Fire
Insurance Co

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☒ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCF; ☐ Rule 41(a), SCRCF (Vol. Nonsuit);
☐ Rule 43(k), SCRCF (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(f) SCRCF; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☒ Statement of Judgment by the Court:

This matter is before the Court on Plaintiff's motion for reconsideration. Plaintiff argues that this Court erred in denying coverage and in not addressing whether or not "property damage" as defined by the policy occurred. This Court finds that the proposed order submitted by attorney for Defendant adequately addresses this issue. In signing the order, this Court respectfully denies Plaintiff's motion.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

Additional Information for the Clerk:

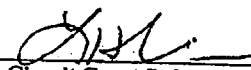
CPFORM4M
SCCA SCRCF Form 4C (Revised 12/2011)

dm

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Entered (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.


Circuit Court Judge

2162
Judge Code

3/25/13
Date

For Clerk of Court Office Use Only

This judgment was entered on 4/10/13, and a copy mailed first class or placed in the appropriate attorney's box on 4/10/13 to attorneys of record or to parties (when appearing pro se) as follows:

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ATTORNEY(S) FOR THE PLAINTIFF(S)

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P.O. Box 1473 Columbia, SC 29202

Joshua Daniel Shaw PO Box 1473 Columbia, SC 29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of
Court - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4C (Revised 12/2011)



Court Reporter

CPFORM4M
SCCA SCRCF Form 4C (Revised 12/2011)

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS

FILED CLERK OF COURT
GREENVILLE CO. S.C.
WICKENSIMER
JUDGMENT IN A CIVIL CASE
CASE NO: 2011CP2302028 2013 APR 10 A 10:38

Precision Walls Inc vs. Liberty Mutual Fire Insurance Co

CHECK ONE:

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRCP; ☐ Rule 41(a),
SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR
ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:
Dated at Greenville, South Carolina, this .

Court Reporter: _____

PRESIDING JUDGE -

This judgment was entered on the 10th day of April, 2013, and a copy mailed first class this 10th day of April, 2013,
to attorneys of record or to parties (when appearing pro se) as follows:

Charles Harry McDonald PO Box 944 Columbia,
SC 29202

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Steven Wayne Ouzts Turner, Padgett, Graham &
Laney, P.A. P.O. Box 1473 Columbia, SC 29202
Joshua Daniel Shaw PO Box 1473 Columbia, SC
29202

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Precision Walls, Inc.

Plaintiff,

vs.

Liberty Mutual Fire Insurance Co.,

Defendant.

FILED-CLERK OF COURT
GREENVILLE, S.C.
PAUL B. WICKLINSKIEN

IN THE COURT OF COMMON PLEAS

2013 APR 10 CASE NO.: 2011-CP-23-2028

ORDER

This matter is before the Court as a non-jury trial presented upon an agreed evidentiary record. The Court filed a Form 4 Order granting judgment in favor of the Defendant on February 19, 2013. The Form 4 Order provided Defendant the opportunity to submit a proposed formal order, which Defendant has done. In accordance with its previous Form 4 Order, the Court substitutes this Order granting judgment in favor of the Defendant.

The only issue before the Court is whether or not a commercial general liability ("CGL") insurance policy issued by the Defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") to Plaintiff, Precision Walls, Inc., covers certain costs associated with the tear-down and replacement of a brick veneer wall during the course of construction in order to replace a defective seal tape used by Precision Walls on the seams of insulation board located behind the brick veneer. The facts material to this issue are undisputed. For the reasons that follow, this Court finds the Liberty Mutual Policy does not cover the losses claimed by Precision Walls. Therefore, the Court grants judgment in favor of Liberty Mutual.¹ The losses incurred by

¹ Precision Walls previously agreed to a dismissal, with prejudice, of the Third Cause of Action of its Amended Complaint, which alleged a statutory claim for attorney fees and costs under S.C. Code Ann. §38-59-40, leaving only its claims for declaratory relief and breach of the insurance contract.

ENTERED COMPUTER

Precision Walls are not covered "property damage" as defined in the insurance policy, did not result from an "occurrence," and were excluded from coverage.

FINDINGS OF FACT

Precision Walls, Inc. was a subcontractor to SYS Constructors, Inc. ("SYS") on a construction project referred to as the Tri-County Technical College Occupational Center (the "Project"). For a one-year period during the Project, from September 30, 2009 to September 30, 2010, Precision Walls was insured under a commercial general liability policy (Policy No. TB2-651-287492-029) issued to Precision Walls by Liberty Mutual (the "Policy").

Insofar as pertinent to this case, the scope of work to be performed by Precision Walls was described as follows in its subcontract:

"Scope of work includes all material, labor, equipment and supervision of the following: all light gauge metal framing of walls, roof trusses and decking, building insulation, densglass on exterior, taped and sealed blue board insulation on exterior, installation of door frames. . . . Exterior insulation to be sealed so as to prevent air infiltration."

After Precision Walls had begun to install the insulation board ("blue board"), but before its work was complete, SYS observed that some of the tape used by Precision Walls to seal the seams between insulation boards was coming loose. Upon further investigation, SYS determined that the tape was unsuitable and would have to be replaced with another tape. In some wall sections, the brick veneer siding had already been installed by the masonry subcontractor over the insulation board. SYS engaged its masonry subcontractor to remove the brick veneer from those wall sections in order to allow Precision Walls access to the underlying insulation board to replace the seal tape. After Precision Walls re-sealed the seams of the insulation board with new tape, the masonry subcontractor installed new brick veneer siding on those walls.

22

When SYS made the decision to remove the brick veneer it was fully intact and there was no damage, according to the testimony of Kevin Howell, Precision Walls' project manager. The only reason SYS required the removal of the brick veneer was to allow access to the insulation board underneath so the seal tape could be replaced. There was nothing wrong with the brick veneer itself.

By change order, SYS deducted the costs of tearing down and rebuilding the brick veneer from the Precision Walls subcontract. The deductive change order was issued by SYS on September 27, 2010 and accepted by Precision Walls in November 2011. The amount deducted from the Precision Walls subcontract for the cost of tearing down and replacing the brick veneer was \$97,500. Precision Walls submitted a claim to Liberty Mutual seeking coverage for this loss under the Liberty Mutual CGL policy. Liberty Mutual denied coverage. This lawsuit ensued.

CONCLUSIONS OF LAW

1. Precision Walls' losses are not "property damage" as defined in the Policy.

The insuring agreement of the Policy provides, in pertinent part, that the insurer "will pay those sums that the insured becomes legally obligated to pay as damages because of 'property damage' to which this insurance applies. . . ." In this case, the Court applies subpart "a" of the Policy definition of "property damage" according to which "property damage" is defined as "[p]hysical injury to tangible property, including all resulting loss of use of that property." Precision Walls makes no claim under subpart "b" of the "property damage" definition, which pertains to "loss of use of tangible property that is not physically injured."

Recently, in *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012)(*rehearing denied* February 26, 2013), the South Carolina Court of Appeals applied the same definition of "property damage" to analogous facts. *Walde* held that



the costs of a contractor's partial tear-down of a portion of a new barn and apartment building then under construction in order to bring the building into compliance with county zoning ordinances did not constitute "physical injury to tangible property" within the definition of "property damage" in a Commercial General Liability ("CGL") insurance policy. *Id.* at 89. See also, *Crossman Communities of North Carolina, Inc. v. Harleyville Mutual Insurance Co.*, ____ S.C. ____, 717 S.E.2d 589 (2011)(cost of repairing or removing defective work is not "property damage.").

In this case, the only loss claimed by Precision Walls is the liability it incurred because of the tear-down and reconstruction of an otherwise undamaged brick veneer wall at the direction of the project owner and general contractor for the remedial purpose of bringing the work of Precision Walls on the underlying insulation into compliance with subcontract specifications. The Court finds the losses claimed by Precision Walls are not "property damage," and therefore, are not covered losses under the Liberty Mutual Policy.

2. The losses claimed by Precision Walls were not the result of an "occurrence."

The insuring agreement covers "property damage" only if it is caused by an "occurrence." According to the Policy Definitions, the term "occurrence" means "an accident, including continuous or repeated exposure to substantially the same general harmful conditions."² In *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the South Carolina Supreme Court, following the majority rule, held that faulty workmanship is not an "occurrence" where the claim is for money damages to compensate for

² The Liberty Mutual Policy was issued September 30, 2009, prior to the effective date of the S.C. Code Ann. §38-61-70 (Supp. 2011), which was May 17, 2011. *Harleysville Mut. Ins. Co. v. State of South Carolina*, Op. No. 27189, Shearouse Advance Sheets (filed November 21, 2012) held unconstitutional the retroactivity clause of S.C. Code Ann. § 38-61-70 so the statute applies only prospectively. It does not apply to this case.

repairing the defective work. 366 S.C. at 124, 621 S.E.2d at 36. To hold otherwise, the court said, would transform the CGL policy into a performance bond, which guarantees the work, rather than an insurance policy, which is intended to insure against accidents. *Id.*

Here, the losses claimed by Precision Walls resulted from a deductive change order charging Precision Walls for costs incurred by SYS in correcting Precision Walls non-conforming work. The Court finds these losses were not caused by an "occurrence" and, therefore, are not covered under the Liberty Mutual Policy.

3. Coverage for the losses claimed by Precision Walls is excluded by the "Damage to Property" Exclusion.

Even if the losses claimed by Precision Walls were found to be within the terms of the insuring agreement, there would be no coverage because the losses are excluded by Policy Exclusion 2(j)(6). In pertinent part, it excludes coverage for "property damage" to:

"(6) That particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it."

The term "your work" is defined as follows in Policy Definitions:

22. "Your Work":

a. Means:

- (1) Work or operations performed by you or on your behalf;
and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

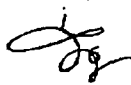
- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
- (2) The providing of or failure to provide warnings or instructions.

An exclusion virtually identical to this one was applied by the South Carolina Supreme Court in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355



(2002), overruled on other grounds, *Crossman Communities of N.C., Inc. v. Harleyville Mut. Ins. Co.*, 717 S.E.2d 589 (2011). In *Century Indemnity*, a homeowner sought coverage under a contractor's commercial general liability policy for property damage to the exterior wall sheathing and substrate of their home caused by water intrusion through an exterior stucco cladding that was improperly installed. Rejecting the homeowners' argument that the exclusion applied only to the defective work (the stucco cladding) and not the damage to the underlying substrate, the court held: "Based on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision." (citations omitted). 348 S.C. at 566, 561 S.E.2d at 359. The court referenced a number of cases from South Carolina and other states that had applied a similar exclusion in analogous factual circumstances, including *Engineered Prods, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 368 S.E.2d 674 (Ct. App. 1988)(coverage excluded for damages resulting from restoration, repair, or replacement of rack system where losses were the result of subcontractor's failure to properly install anchor system); and *C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey*, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (coverage excluded for property damages resulting from faulty workmanship).

Following *Century Indemnity*, the Court of Appeals held in *Walde* that an exclusion identical to 2(j)(6) "excluded coverage not only for (1) 'property damage' to defective work caused by that defective work but also (2) 'property damage' to non-defective work caused by the defective work." These authorities confirm that any coverage for the losses claimed by Precision Walls is excluded by Policy Exclusion 2(j)(6).



THEREFORE, IT IS ORDERED AND ADJUDGED that the Liberty Mutual Policy provides no coverage for Precision Walls' losses, and judgment is granted in favor of the Defendant on all claims and causes of action.

AND IT IS SO ORDERED.

Greenville, South Carolina

Date: 3/6/13



Letitia H. Verdin, Circuit Court Judge



STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Precision Walls, Inc.

Plaintiff,

v.

Liberty Mutual Fire Insurance Co.,

Defendant.

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-23-2028

AMENDED COMPLAINT

FILED CLERK OF COURT
GREENVILLE CO. S.C.
JAN 8 WICKENS JR
2011 DEC -1 A 8 46

Now comes the Plaintiff, Precision Walls, Inc. ("PWI"), who does state the following:

1. PWI is a North Carolina corporation which is authorized to transact business in South Carolina. PWI is a licensed contractor engaged in specialty construction work in South Carolina.
2. Liberty Mutual Fire Insurance Co. ("Liberty Mutual") is an insurance company authorized to act as an insurer in South Carolina.
3. Liberty Mutual issued a Commercial General Liability Policy to Precision Walls, Inc., Policy number TB2-651-287492-029, effective from September 30, 2009 to September 30, 2010 (hereafter the "Policy"). The terms and conditions of the Policy are incorporated herein by reference.
4. During the coverage period of the Policy, PWI acted as a subcontractor to SYS Constructors ("SYS") on a project known as Tri County Technical College Operational Center (the "Project").

1 Alm

5. SYS asserted that portions of PWI's work required remediation because of an accidental event, and SYS removed a brick veneer wall such that PWI could remediate the affected portions of its work.

6. SYS deducted the cost of removing and replacing the brick veneer wall, along with associated overhead costs incurred by SYS, from payments otherwise due to PWI for its work performed on the Project.

7. The brick veneer wall removed by SYS was not part of PWI's scope of work on the Project, and PWI performed no work on the brick veneer wall.

8. This damage to the work and/or property of another constituted property damage caused by an occurrence as those terms are used and defined in Policy.

9. PWI is legally obligated to pay to SYS the sum of \$97,500.00 for the property damage. SYS has withheld the above amount from final payment to PWI on the Project and has issued a deductive change order to the PWI subcontract with SYS reflecting same.

10. PWI made a timely claim on the Policy to cover these losses that were covered by the terms of the Policy.

11. Liberty Mutual has disclaimed any obligations to PWI relating to the brick veneer wall removed by SYS, and has failed and refused to accept coverage for PWI's claim.

FOR A FIRST CAUSE OF ACTION
(Declaratory Relief)

12. The allegations of Paragraphs 1 through 11 are re-alleged and incorporated herein by reference.

2. *clean*

13. Pursuant to S.C. Code Ann. § 15-53-30, PWI brings this action for declaratory relief in order that the Court can construe the Policy in the context of the present dispute between the parties and provide such further relief in favor of PWI pursuant to S.C. Code Ann. § 15-53-120 as is appropriate in light of the Court's construction of the contract.

FOR A SECOND CAUSE OF ACTION
(Breach of Contract of Insurance)

14. The allegations of Paragraphs 1 through 11 are re-alleged and incorporated herein by reference.

15. The Policy is a contract of insurance between PWI and Liberty Mutual.

16. PWI's claim is covered under the Policy.

17. Liberty Mutual has breached the insurance contract by failing and refusing to pay to PWI the amount of its covered loss which totals \$97,500.00.

18. PWI is entitled to judgment against Liberty Mutual in the amount of \$97,500.00 together with interest thereon at the prevailing legal rate from the date of its claim under the policy.

FOR A THIRD CAUSE OF ACTION
(Violation of S.C. Code Ann. § 38-59-40)

19. The allegations of Paragraphs 1 through 11 and 15 through 18 are re-alleged and incorporated herein by reference.

20. Liberty Mutual has failed and refused to pay the claim made by PWI under the Policy.

21. More than 90 days has elapsed since PWI gave Liberty Mutual notice of its claim under the Policy.

22. The refusal by Liberty Mutual to pay the claim was unreasonable and/or in bad faith in the following particulars, among others:

a. Failing to do a proper and reasonable investigation into the underlying facts and nature of the claim;

b. Failing to act with sufficient diligence and promptness with respect to reviewing and assessing the claim;

c. Failing to assign the review of the claim to persons with sufficient competence and experience to handle claims such as the one made by PWI;

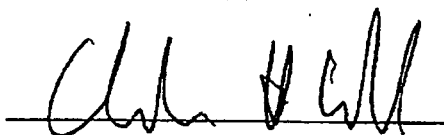
d. Improperly focusing on subrogation efforts as to third-parties; and

e. Leading PWI to believe the claim was covered and then denying the claim immediately upon receiving notice from a third party that it had rejected Liberty Mutual's tender of the claim.

23. PWI is entitled to recover attorney's fees and costs pursuant to S.C. Code Ann. § 38-59-40 and requests that the trial court award same pursuant to the statute.

4 *Claim*

WHEREFORE, PWI prays that the Court investigate the matters alleged in this declaratory judgment action; that the Court issue an order declaring that PWI's claims are covered by the Policy; that the Court find that Liberty Mutual is in breach of the contract of insurance and award PWI its loss as set forth herein together with interest thereon at the prevailing legal rate; that the Court award PWI its costs and reasonable attorney's fees pursuant to S.C. Code Ann. § 38-59-40; and that the Court provide such additional relief to PWI as is appropriate.



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Counsel for Plaintiff

November 29, 2011

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Precision Walls, Inc.

Plaintiff,

vs.

Liberty Mutual Fire Insurance Co.,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2011-CP-23-2028

) ANSWER AND DEFENSES OF DEFENDANT
) LIBERTY MUTUAL FIRE INSURANCE CO.
) TO AMENDED COMPLAINT

The Defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") answers the Amended Complaint of the Plaintiff as follows:

FIRST DEFENSE

1. Liberty Mutual admits the allegations of paragraph 1 of the Amended Complaint, based upon information and belief.
2. Liberty Mutual admits the allegations of paragraph 2 of the Amended Complaint.
3. Liberty Mutual admits the allegations of paragraph 3 of the Amended Complaint and refers to and incorporates by reference the Commercial General Liability Policy No. TB2-651-287492-029 ("the Policy") issued to Plaintiff for the terms and conditions thereof.
4. Liberty Mutual admits the allegations of paragraph 4 of the Amended Complaint.
5. Liberty Mutual admits only so much of the allegations of paragraph 5 of the Amended Complaint as alleges that a portion of the work performed by Precision Walls on the Project was remediated at the direction of the general contractor. Liberty Mutual denies that such remedial work was required because of an accidental event. As to any remaining allegations of paragraph 5, Liberty Mutual lacks knowledge or information sufficient to form a belief concerning the truthfulness of the allegations and, therefore, demands strict proof thereof.

6. Liberty Mutual lacks knowledge or information sufficient to form a belief concerning the truthfulness of the allegations of paragraph 6 of the Amended Complaint and demands strict proof thereof.

7. Liberty Mutual lacks knowledge or information sufficient to form a belief concerning the truthfulness of the allegations of paragraph 7 of the Amended Complaint and demands strict proof thereof.

8. Liberty Mutual denies the allegations of paragraph 8 of the Amended Complaint.

9. Liberty Mutual admits only so much of paragraph 9 of the Amended Complaint as alleges SYS issued a deductive change order to the Precision Walls subcontract reflecting the withholding of the stated amount for certain changes in the work. Except as expressly admitted, Liberty Mutual denies the allegations of paragraph 9 of the Complaint.

10. Liberty Mutual admits only so much of paragraph 10 of the Amended Complaint as alleges that the claim made by Precision Walls was timely. Liberty Mutual denies the claimed losses were covered by the terms of the Policy issued to Precision Walls.

11. Liberty Mutual admits the allegations of paragraph 11 of the Amended Complaint.

12. Answering paragraph 12 of the Amended Complaint, Liberty Mutual incorporates by reference the answers set forth in paragraphs 1 through 11 herein.

13. Liberty Mutual denies the allegations of paragraph 13 of the Amended Complaint.

14. Answering paragraph 14 of the Amended Complaint, Liberty Mutual incorporates by reference the answers set forth in paragraphs 1 through 13 herein.

15. Liberty Mutual admits the allegations of paragraph 15 of the Amended Complaint.

16. Liberty Mutual denies the allegations of paragraph 16 of the Amended Complaint.

17. Liberty Mutual denies the allegations of paragraph 17 of the Amended Complaint.

18. Liberty Mutual denies the allegations of paragraph 18 of the Amended Complaint.

19. Answering paragraph 19 of the Amended Complaint, Liberty Mutual incorporates by reference the answers set forth in paragraphs 1 through 18 herein.

20. Liberty Mutual admits only so much of the allegations of paragraph 20 of the Amended Complaint as alleges that Liberty Mutual has refused to pay the claim made by Precision Walls. Except as expressly admitted, Liberty Mutual denies the allegations of paragraph 20.

21. Liberty Mutual admits the allegations of paragraph 21 of the Amended Complaint.

22. Liberty Mutual denies the allegations of paragraph 22 of the Amended Complaint, including all subparts.

23. Liberty Mutual denies the allegations of paragraph 23 of the Amended Complaint.

24. Liberty Mutual denies each and every allegation of the Amended Complaint except those expressly admitted in this Answer, and denies the Plaintiff is entitled to the requested relief.

SECOND DEFENSE

25. The losses claimed by Plaintiff under the Policy do not constitute "property damage" caused by an "occurrence" as defined in the Policy and, therefore, are not covered by the Policy. The applicable Policy provisions are incorporated herein by reference, along with all related definitions.

THIRD DEFENSE

26. The losses claimed by Plaintiff under the Policy were not caused by an "accident," but are instead the natural and probable consequences of Plaintiffs' own faulty or deficient work or other failure of performance under its subcontract, and, therefore, are not covered under the

Policy. The applicable Policy provisions are incorporated herein by reference, along with all related definitions.

FOURTH DEFENSE

27. The losses claimed by Plaintiff are excluded from coverage under the Policy according to exclusion "j.(5)," which says, in pertinent part, the Policy does not apply to "property damage" to "that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations." The exclusion, in its entirety, is incorporated herein by reference, along with all related definitions and policy provisions.

FIFTH DEFENSE

28. The losses claimed by Plaintiff are excluded from coverage under the Policy according to exclusion "j.(6)," which says, in pertinent part, the Policy does not apply to "property damage" to "that particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it." The exclusion, in its entirety, is incorporated herein by reference, along with all related definitions and policy provisions.

SIXTH DEFENSE

29. The losses claimed by Plaintiff are excluded from coverage under the Policy according to exclusion "l." which says, in pertinent part, the Policy does not apply to "property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard." The exclusion, in its entirety, is incorporated herein by reference, along with all related definitions and policy provisions.

SEVENTH DEFENSE

30. The losses claimed by Plaintiff are excluded from coverage under the Policy

according to exclusion "m." which says, in pertinent part, the Policy does not apply to "property damage" to "impaired property" or property that has not been physically injured arising out of:
(1) A defect, deficiency, inadequacy, or dangerous condition in "your product" or "your work;"
or (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms." The exclusion, in its entirety, is incorporated herein by reference, along with all related definitions and policy provisions.

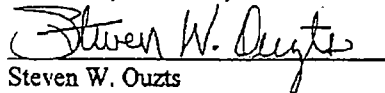
RESERVATION AND NON-WAIVER

31. Liberty Mutual asserts all defenses available to it under the Policy and under applicable law and reserves the right to amend this Answer to include such additional defenses as may be indicated by discovery.

WHEREFORE, having fully answered, Liberty Mutual prays that the Amended Complaint be dismissed, with costs, and for such other and further relief as the Court may deem just and proper.

December 7, 2011

TURNER, PADGET, GRAHAM & LANEY, P.A.



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Attorneys for Liberty Mutual Fire Insurance Company

1 STATE OF SOUTH CAROLINA)

2 : IN THE COURT OF COMMON PLEAS

3 COUNTY OF GREENVILLE) CASE NO. 2011-CP-23-2028

4)

5 Precision Walls, Inc.)

6)

7 Plaintiff(s),)

8)

9 -vs)

10 Liberty Mutual Fire)

11 Insurance Company,)

12 Defendant(s),)

13 -----)

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25)

DEPOSITION OF:

Kevin Howell

Given before Courtney Young, Court Reporter and
Notary Public, in the law offices of Robinson, McFadden
& Moore, 1901 Main Street, Columbia, South Carolina, on
Tuesday, December the 6th, 2011, commencing at 10 a.m.

Job No. CS365213

Veritext Corporate Services

800-567-8658

973-410-4040

A-P-P-E-A-R-A-N-C-E-S

For the Plaintiff

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By: Charles H. McDonald

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Columbia, South Carolina 29202

For the Defendant

Turner Padget

By: Steven Ouzts

1901 Main Street

17th Floor

Columbia, South Carolina 29202

Also Present:

Gary Roth

INDEX TO EXAMINATIONS

Direct Examination by Mr. Ouzts

3

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1 (Kevin Howell, having been duly sworn, testifies
2 as follows:)

3 DIRECT EXAMINATION BY MR. OUZTS:

4 Q. Mr. Howell, my name is Steve Ouzts. I'm a
5 lawyer representing Liberty Mutual Insurance Company in
6 this case. We're going to take your deposition today.
7 Have you ever had your deposition taken before?

8 A. I have not.

9 Q. Okay. Are -- are -- well, let me just
10 familiarize you, give you some familiarity with the
11 procedure of it then.

12 It's -- it's a chance for me to learn from
13 someone who has first-hand knowledge of what the facts of
14 this case are. And it's a question and answer format,
15 just as it would be in a trial. You are under oath, just
16 as you would be in a trial. It's, as you can see, a
17 little less formal than a trial and there is no judge
18 here, but the court reporter will be taking down
19 everything we say on the record verbatim and making --
20 and when it's done, she will make a transcript of the
21 proceeding. I'll be as clear as I can in my questions to
22 you, but if I ask you a question that you don't
23 understand or want clarification of, please, let me know,
24 and I will try to clarify.

25 A. Sure.

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800-567-8658

973-410-4040

1 Q. It's important to give verbal responses so
2 the court reporter can make an accurate record of what's
3 said. Sometimes, as you know, when in just casual
4 conversation, we tend to communicate with head nods or
5 shaking of the head and that sort of thing. The court
6 reporter can't really get that down, so try to keep that
7 in mind as we go along.

8 A. Okay.

9 Q. There may be from time to time objections
10 made by your lawyer through a question that I might ask.
11 As a general rule, the objections are made for the record
12 so that the judge can rule on them at some later time.
13 You are still allowed to answer the question unless your
14 lawyer instructs you not to, and there are situations
15 where that can come up. But just so you don't get
16 distracted as we go along, I wanted to let you know that.
17 If you want to take a break for any reason, just let me
18 know --

19 A. Okay.

20 Q. -- and we can do that and go off the record.
21 Let's start. Could you give me your full
22 name again, please?

23 A. Kevin Mark Howell.

24 Q. And what's your current address?

25 A. 121 Persimmon, that's "P" as in "Paul",

1 e-r-s-i-m-m-o-n, Ridge Road, Cleveland, South Carolina
2 29635.

3 Q. And what's your current employment?

4 A. At Precision Walls, Incorporated. I am
5 general manager for the Greer office.

6 Q. And how long have you held that position with
7 Precision Walls?

8 A. Four and a half years.

9 Q. Is that the position you held when the events
10 of this claim happened?

11 A. Yes, it is.

12 Q. How long have you been employed by Precision
13 Walls?

14 A. About three and a half years.

15 Q. And what was your position when you first
16 joined them?

17 A. General manager.

18 Q. Okay. Give me a description, if you would,
19 please, of what your responsibilities are as general
20 manager.

21 A. I oversee the operations of the entire
22 office, including sales and also including our field
23 installation, because we are a commercial construction
24 firm. So I oversee all those operations, selling the
25 work to installation, general overseer.

1 Q. How many employees do you have in the
2 Greenville -- excuse me -- the Greer office?
3 A. Including our field employees or just office?
4 Q. Yes, all.
5 A. Roughly 50.
6 Q. Was the office there when you started with
7 Precision Walls, or were -- did you start that office?
8 A. I actually helped start that office.
9 Q. All right. Who was your immediate
10 supervisor?
11 A. Brian Allen.
12 Q. And is he in the Greer office also?
13 A. No, he is not. He's based out of our Raleigh
14 office. That's our home office.
15 Q. Okay. What's his job title?
16 A. President.
17 Q. Let me digress a little bit. I want to find
18 out about your education background and your employment
19 experience before you joined Precision Walls.
20 A. Yes, sir.
21 Q. Tell me, did you go to college?
22 A. I did.
23 Q. Did you get a degree?
24 A. I have a two-year degree from Greenville Tech
25 in business.

1 Q. And when did you obtain that degree?

2 A. I obtained it in 1985.

3 Q. Okay. What did you do immediately after you
4 obtained your degree from Greenville Tech?

5 A. I went to PPG Industries, which is a -- it
6 stands for Pittsburgh Paint and Glass. I actually worked
7 for their -- for a paint store that was owned by PPG
8 Industries.

9 Q. What was your job at the paint store?

10 A. Just an entry-level clerk. I was a delivery
11 guy, counter guy.

12 Q. How long did you stay with that job?

13 A. I was with them for approximately 18 months
14 at that time. They closed operations, and then I was
15 hired by Duron Paints and Wallcoverings. I was hired
16 with them as an assistant manager.

17 Q. Where was that located?

18 A. On Woodruff Road in Greenville.

19 Q. How long did you stay there?

20 A. I was there almost ten years.

21 Q. Give me sort of a sketch of how you advanced
22 in the company at Duraline after you joined them?

23 A. Well, I was hired as an assistant manager.
24 The manager that I worked there was transferred to
25 another location in Anderson. I was promoted to manager,

1 and I was the manager of that operation for almost ten
2 years.

3 Q. And what were your responsibilities as
4 manager of that facility?

5 A. Well, I was responsible for inventory
6 management, keeping the store stocked. We were basically
7 a commercial-based operation, although we did do retail
8 sales. But, you know, I was responsible for all of the
9 inside operations as far as the deliveries, inventory
10 management, making sure sales were posted, customer
11 relations, you know, basically the general operation of
12 that store.

13 Q. Did Duraline have -- was it involved in
14 construction at all as a contractor --

15 A. No.

16 Q. -- or subcontractor?

17 A. No, it was not.

18 Q. During the course of your time with Duraline,
19 did you yourself have any involvement in construction
20 contracting?

21 A. No, I did not.

22 Q. What -- and so it would have been about 1996
23 or '97 when you left Duraline?

24 A. That's correct.

25 Q. And what did you do?

1 A. It was at that point I was hired by Bonitz
2 Contracting as an entry-level estimator. And they are a
3 commercial construction company, and they do basically
4 the same work that we at Precision Walls do, metal stud
5 framing, drywall, insulation, stucco, acoustical
6 ceilings, basically the same stucco work.

7 Q. Okay.

8 MR. MCDONALD: Steve, I think he said Duron,
9 D-u-r-o-n --

10 THE WITNESS: Yeah, it is.

11 MR. MCDONALD: -- rather than Duraline.

12 MR. OUZTS: Thank you for that. I started to
13 ask you to spell it for me, but...

14 THE WITNESS: Yeah. Sorry.

15 MR. OUZTS: Sorry. It's not your fault.

16 Q. And how long were you with Bonitz?

17 A. Almost ten years.

18 Q. And could you, again, trace for me your
19 advancement through that company?

20 A. Well, when I started out, like I said, I was
21 an entry-level estimator which meant in our business, I
22 started off basically estimating simple, smaller jobs
23 such as acoustical ceiling jobs and smaller, what we
24 would call, drywall jobs, which would be, contract-wise,
25 \$10,000, \$20,000. I was moved up. I started advancing,

1 taking more complicated jobs as my training advanced
2 inhouse. Within two years, I was allowed to estimate
3 basically any size job. And then after -- there was a
4 transition that took place after about four years that
5 the majority of my work was dealing on the design build
6 basis, whereas I was taken away from the public bid work
7 and starting dealing with customers more in a direct
8 fashion.

9 General contractors who did a lot of negotiated
10 work and design build, which, I mean, design build work
11 is sometimes you are dealing with two pages of drawings,
12 and you're helping them develop a schematic budget for
13 their customer. And so it was more sales oriented, but
14 it was also in the design build phrase, required a lot of
15 communication with the customer to try to determine what
16 they wanted, help them develop a realistic budget so they
17 could go back to a client. The client would decide
18 whether they wanted to move on with the project.

19 Q. Well, let me make sure I understand. When
20 you say you dealt more directly with the customer, are
21 you referring primarily to the general contractor?

22 A. I am, yes, sir.

23 Q. And --

24 A. Almost exclusively.

25 Q. And you mentioned -- you mentioned the

1 client. You would -- that would be the building owner?

2 A. That's correct.

3 Q. Okay.

4 A. Yes.

5 Q. In your position as an estimator with Bonitz,
6 and let's just talk first about just your bid project.
7 Were you at all involved in the selection of materials
8 that were to be used on the project?

9 A. If it was a design build function, I would be
10 asked, you know, what do you think about this particular
11 system or whatever. And it could be anything from just
12 purely aesthetics. They might want to know what kind of
13 ceiling tile we -- was most popular at that time or
14 whatever. But, yes, from time to time I would be asked.

15 Q. When you were -- aside from the design build
16 product -- project when it was just a -- when you were
17 just involved to prepare a bid for Bonitz, was part of
18 your job to select the materials that Bonitz would be
19 using on the project?

20 A. Typically not because you were typically
21 bound by specifications that were issued by the
22 architect, and usually those are pretty strict. They
23 might give you some guidelines within suppliers that you
24 could use, but they would specify the material that had
25 to be used, and so you were pretty well bound by those

1 guidelines.

2 Q. And so your job in that role was basically
3 pricing the materials --

4 A. That is correct.

5 Q. -- that had been specified?

6 A. That is correct.

7 Q. What kind of background work would you do to
8 price the materials that had been specified?

9 A. Well, you would read the specifications that
10 were issued by the architect.

11 Q. Did -- let me refine my question.

12 Did you have any contact at all with the
13 manufacturer of the materials in that -- in that role?

14 A. Typically not because if you needed
15 information about the materials -- when you are
16 talking -- it could be ceiling tile or studs or sheetrock
17 or whatever. Most of that information is available,
18 either in brochures that they provide to us or either on
19 the internet.

20 Q. What are submittals as used in the
21 construction industry?

22 A. Well, submittals are basically -- when you
23 have been chosen to do a job, you look at the
24 specifications that were issued by the architect. I'll
25 use steel studs for example. That architect will give

1 you a list of approved vendors or suppliers, and then you
2 choose from among your local suppliers who supplies one
3 of those products and you obtain your best price based on
4 those. Then typically you provide basically a data sheet
5 on that product, and you give that to the architect
6 through the GC. They all receive copies, and the
7 architect reviews it and he approves it or says no, this
8 product won't work because it doesn't meet this part of
9 my specification. That's basically what a submittal is.

10 Q. Would you -- if you were doing a design build
11 -- well, this would occur after you've been selected for
12 the job, correct?

13 A. That's correct.

14 Q. In a design build project, would you -- would
15 a subcontractor such as Bonitz submit or make submittals
16 in a similar fashion?

17 A. No, sir. No, sir, not that I ever did.

18 Q. Okay. Is the submittal process a common
19 practice in the construction industry based on your
20 experience?

21 A. It's pretty much standard, yes.

22 Q. Okay. Did you leave Bonitz and then go
23 directly to Precision Walls, or was there an interim
24 period where there --

25 A. There was an interim.

1 Q. Okay.

2 A. I left Bonitz. I was hired by a company
3 called Partitions Incorporated of Wilmington. I think
4 that's their official name. Everybody knew them as
5 Partitions, but their official business name was
6 Partitions Incorporated of Wilmington.

7 Q. Could you spell that?

8 A. P-a-r-t-i-t-i-o-n-s.

9 Q. Okay.

10 A. I worked for them for eight months.

11 Q. What was your job?

12 A. I was general manager.

13 Q. And what was the kind of business were they
14 in?

15 A. The very same business as Bonitz and
16 Precision Walls, metal stud, drywall.

17 Q. And so you left Partitions to go to work for
18 Precision Walls?

19 A. I did not.

20 Q. Oh, I'm sorry.

21 A. No. And I may have misled you a little bit
22 on the Bonitz deal. I worked for them accumulative -- as
23 best as I can remember, a total of ten years because I
24 went back to Bonitz after I left Partitions. Partitions
25 went bankrupt, and I went back to Bonitz.

1 Q. Okay. I see.

2 A. Yes, sir.

3 Q. All right. And did you have the same

4 position when you went back with Bonitz?

5 A. Yes, basically, yes, sir.

6 Q. And -- all right. After that second time

7 with Bonitz, where did you go?

8 A. To Precision Walls.

9 Q. Okay. And why did you leave Bonitz?

10 A. Precision Walls afforded me an opportunity

11 that I didn't have at Bonitz, and it was an opportunity

12 to help start up an office. Precision Walls is a very --

13 has been a very successful company, and the -- basically,

14 it was just -- I felt like the best move for myself and

15 my family.

16 Q. Okay. Now, I want to -- I do want to talk

17 about the job that we're here for, but I'm trying to get

18 some preliminaries out of the way before we do that. The

19 next thing I want to do is to ask you some questions

20 about some -- some individuals. Who is Jerry Golt?

21 A. He's our director of safety for Precision

22 Walls.

23 Q. Based in the Raleigh office?

24 A. Raleigh office, yes, sir.

25 Q. Do you know Pete Hubbard (ph)?

1 A. Yes, I do.

2 Q. Who is Pete Hubbard?

3 A. At that time, Pete Hubbard was our project
4 manager in the Greer office.

5 Q. When you say at that time, do you mean at the
6 time the -- was it Trident Tech?

7 A. Yes, sir.

8 MR. MCDONALD: Tri-County.

9 THE WITNESS: Tri-County Tech, yeah.

10 Q. Tri-County Tech.

11 Was it at the time Tri-County Tech -- of the
12 Tri-County Tech job?

13 A. Yes.

14 Q. Was he there for the entire job?

15 A. No, sir, he was not.

16 Q. Did he leave the company?

17 A. He was relieved of his duties.

18 Q. For what reason?

19 A. Non-performance.

20 Q. And what was the nature of his
21 non-performance?

22 A. He was -- what's the word I am looking for?
23 He was late with a lot of things. He was -- would not
24 take full responsibility of the position he was in.
25 Seemed to be overwhelmed at times by the position.

1 Q. Who replaced Pete Hubbard as the project
2 manager of the Tri-County Tech job?

3 A. Well, we had a guy named Greg Stockwell (ph)
4 who transferred to our office from Charlotte. He
5 basically finished up what little bit of work there was
6 to be done, but in the interim -- because there was an
7 interim from between the time of Pete and Greg. I
8 basically handled it myself, but it was at the very end
9 of the job.

10 Q. Who is Jimmy Taylor?

11 A. Jimmy Taylor was our general superintendant.
12 It was his responsibility to, you know, he handled the
13 labor end of it, making sure we had manpower on the job.

14 Q. What were the responsibilities -- I want to
15 go back to Mr. Hubbard for a minute. What are the
16 responsibilities of project manager?

17 A. Once a job is sold, the project manager is
18 given the documentation the job had been sold. It is his
19 responsibility at that point to develop a budget, labor
20 budget, material budget. It's his job for -- to handle
21 submittals. It's his job to attend meetings. Typically,
22 they are weekly or biweekly meetings at the job site. It
23 is his job to communicate with the project manager for
24 the general contractor and price change orders, and deal
25 with issues like that that come up. I mean sometimes the

1 first line of communication on labor issues if, for
2 instance, they don't think we have enough men onsite or
3 they are concerned about future manpower, they contact
4 him and then he would contact our general superintendant.

5 Q. Okay. Hayward Lambert, who is he?

6 A. He was our onsite foreman.

7 Q. What was -- give me a description of his job.

8 A. Well, he handled manpower specific to the
9 Tri-County Tech job. It was his responsibility to make
10 sure that our guys were installing, you know, framing
11 correctly. Any of the scope of our work, he was to
12 supervise it was installed properly and done in a
13 hopefully speedy but correct way.

14 Q. Dennis John Doherty.

15 A. Yup.

16 Q. Who is that?

17 A. Project manager for SYS Constructors.

18 Q. Jeff Gillstrap (ph).

19 A. At that time, Jeff Gillstrap was CFO for SYS
20 Constructors.

21 Q. How about Rob Moore?

22 A. To the best of my knowledge, Rob Moore's
23 title at that time was assistant project manager to DJ
24 for that particular project.

25 Q. Stacy Phillips?

1 A. Stacy Phillips was the onsite superintendant
2 for SYS.

3 Q. I saw two names in the -- in the records from
4 the Neal Prince Architects. One is Chris Stone and the
5 other is Luke Miller.

6 A. Uh-huh.

7 Q. Were both of those individuals involved in
8 the Tri-County Tech job?

9 A. Well, I know Chris Stone was because I dealt
10 with Chris before. The other gentleman, I think I
11 remember him. I think I was introduced to him at a
12 meeting, but I can't swear to it because there was more
13 than those two guys at a meeting from Neal Prince. Chris
14 Stone I know was involved in it, because I dealt with him
15 in the past.

16 Q. Okay. What was your involvement in the --
17 let me ask you another question first.

18 What kind of project was the Tri-County Tech
19 project? Was it a bid project or a design build project?

20 A. Well, it was sort of both. And the reason I
21 say both is because originally, they -- Tri-County Tech.
22 contacted two different general contracting firms. One
23 was MB Kahn-Argo which is based out of Greenville. The
24 other one was SYS Constructors. They were given some
25 perimeters to present a design build budget to the

1 school. We actually priced both scenarios for each GC.

2 Q. When you say both scenarios --

3 A. Well, they come up with their own -- they
4 come up with their own design. Now, the designs were
5 similar, but then they developed a budget based upon
6 feedback from subs like us and mechanical, electrical,
7 plumbing, whoever, and Tri-County Tech decided to award
8 the project to SYS Constructors. And then once -- at
9 that point, it really did become a design-build project,
10 because basically the general contractor teams up with an
11 architect. So SYS was teamed up with Neal Prince and
12 Partners, and MB Kahn was partnered with -- and I'm not
13 positive, but I think it was Craig-Gaulden & Davis out of
14 Greenville.

15 Q. Did Precision Walls prepare a bid for SYS
16 contractors initially?

17 A. Yes.

18 Q. And was the bid that was submitted by
19 Precision Walls based on specifications prepared by Neal
20 Prince?

21 A. That's correct. Yes, sir.

22 MR. OUZTS: (To the court reporter) Would
23 you mark this as Number 1, please?

24 (Whereupon Exhibit No. 1 was marked for
25 identification.)

1 Q. Mr. Howell, I want to show you what I've
2 marked as deposition Exhibit No. 1 and ask you to take a
3 look at that and tell me what it is, please, if you
4 recognize it.

5 A. Yes, sir. This was our subcontract that
6 signed with SYS Constructors.

7 Q. And is that your signature on behalf of
8 Precision Walls?

9 A. Yes, it is.

10 Q. There are a list of attachments on Page 1.
11 Do you see that?

12 A. Yes, sir.

13 Q. And those are all part of the subcontract,
14 correct?

15 A. Yes, sir.

16 Q. Now, there's also a reference in the
17 preceding paragraph, Section 1, Scope of Work to the --
18 what's referred to as the contract documents between the
19 owner and the contractor. Do you see where I am
20 referring to?

21 A. Yes. I do see that.

22 Q. Is it your understanding that those are also
23 part of Precision Walls subcontract with SYS?

24 A. Yes.

25 MR. OUZTS: Chuck, I'll put in a request if

1 you'd like, but I'd like a copy of the contract
2 documents between SYS and the owner.

3 MR. MCDONALD: What were they again?

4 MR. OUZTS: Let's see. They are the drawings
5 and specifications prepared by the architect
6 engineer and the general supplementary conditions.

7 MR. MCDONALD: Okay.

8 Q. Mr. Howell, I want to refer you to Section 2,
9 Scope of Work, and I have a few question about that.

10 A. Yes, sir.

11 Q. Well, maybe the easiest way to do this is
12 with reference to the scope of work of Precision Walls as
13 defined in the subcontract. Can you describe for me the
14 work that Precision Walls did?

15 A. Yes.

16 Q. Okay. Could you do that for me?

17 A. Basically, what we provided was the light
18 gage metal stud framing for the entire job. We provide
19 the light gage metal trusses for the job. We provided
20 all of the insulation for the job. We provided all of
21 the drywall. We provided setting of the hollow metal
22 door frames, which were provided by the contractor. That
23 was a labor only. We provided all of the acoustical
24 ceilings. We also had to provide a Level 5 finish for
25 the exposed areas of sheetrock which were for public

1 view. And that's -- that's pretty much it.

2 Q. When you say provide, I take it that you mean
3 you provided the materials and Precision Walls did the
4 installation work as well?

5 A. That is correct. Yes, sir.

6 Q. Did Precision Walls subcontract out any of
7 the work that was within Precision Walls' scope --

8 A. Yes.

9 Q. -- on the job?

10 A. Yes, we did.

11 Q. What did you subcontract out?

12 A. The light gage trusses were subbed out to
13 Stark Trusses or the Stark Truss Company. And we subbed
14 out -- I know that we subbed out some of the hanging and
15 finishing and the acoustical ceilings. I can not tell
16 you what percentage it is. I just don't remember.

17 Q. Was the installation of the seal tape subbed
18 out.

19 A. No, sir. Not to -- to the best of my
20 knowledge, it wasn't.

21 Q. So let me see if I can get a clear
22 understanding. When Precision Walls arrived on the -- on
23 the job site to begin its work --

24 A. Uh-huh.

25 Q. -- what was there?

1 A. Basically a steel structure on concrete, and
2 our first step was to start framing the exterior walls.

3 Q. When did the work of Precision Walls begin?

4 A. I'd have to go back and look at the
5 documents, but I'm going to say it was somewhere in
6 October or November.

7 Q. Of 2009?

8 A. Yes.

9 Q. So it -- the work of Precision Walls began
10 before this subcontract was signed?

11 A. I don't know. I'd have to go back and look,
12 because I don't see -- I'm not saying that's not a
13 possibility because it could be.

14 Q. Okay. And it may not be important, but it
15 just appeared as though the work was pretty far along by
16 January and this -- I noticed that at least SYS received
17 this executed contract in December.

18 A. Yes. You are exactly right, yes.

19 Q. Okay. As related to the scope of work of
20 Precision Walls, can you give me the sequence in which
21 Precision Walls would have done its work in the walls?

22 A. Yes, sir. We started framing the exterior
23 walls. At some point, you have enough of the exterior
24 walls constructed to -- at that point, you want to start
25 applying to sheathing, which is commonly known in our

1 business as densglass sheathing. We were using an equal
2 product to that called Securock, which you will see in
3 the submittals. Securock is an equal to densglass that
4 was provided to us by USG though CK Supply.

5 And once that product was applied, then the
6 rigid foam insulation is provided over that. And it's --
7 the joints are staggered. If I'm getting too technical,
8 just tell me, but it's --

9 Q. I understand what you're saying.

10 A. They're staggered joints over the -- so the
11 joints don't line up with the Securock. Then at that
12 point, the tape was applied to the rigid foam board
13 sheathing.

14 Q. All right. How was the Securock attached to
15 the metal framing?

16 A. With screws.

17 Q. Do you know what the composition of Securock
18 is?

19 A. It has fiberglass in it, but I can't tell you
20 everything that's in it.

21 Q. What are the advantages over a product like
22 densglass or Securock over, say OSB sheathing or
23 wood-based sheathing?

24 A. It's more durable as far as weather goes. It
25 can also -- it's become the choice of most architects

1 because of the durability of it. It can remain exposed
2 to weather longer. It can also be used in some
3 applications, which we didn't have this on this project.
4 But it could be used for direct applied stucco, and it is
5 used in those applications also.

6 Q. Does the -- is Securock considered a
7 structural component?

8 A. It does provide -- to the best of my
9 knowledge -- I'm not an engineer, but it does provide
10 some structural rigidity to the exterior wall. Just
11 simply by the fact, if you go up and grab studs and there
12 is nothing to tie those together, you can move them
13 around, twist them, whatever. Once that's applied, it
14 does apply some structural enhancement to the wall.

15 Q. Okay. Now, you mentioned that a ridged foam
16 board was installed over the densglass. How was the --
17 how was that foam board attached to the densglass?

18 A. You know to the best of my knowledge, I think
19 it was applied with a screw. That screw has like a wafer
20 head on the top of it which provides a nice area for that
21 screw to sit into, because you're going through a light
22 weight product, and then you are going to have to go
23 through the Securock and into that stud to secure it.
24 But I don't remember, but I'm almost positive that's what
25 we used.

1 Q. So your understanding is that there would be
2 a screw that would be -- that would extend through the
3 rigid insulation board through the Securock and into the
4 stud?

5 A. Yes, sir.

6 Q. Into the metal stud?

7 A. Yes, sir.

8 Q. And what was the -- first of all, what was
9 the composition of the rigid foam board?

10 A. I'm not sure that I even know the correct
11 terminology. It's like a polystyrene board, but it's
12 made for exterior applications. There is different
13 classes within that and from what I understand, it has to
14 do with the density of the board, because there is
15 different densities for different operations. Like if
16 you are going to put up a foam for stucco, it has a much
17 more dense product than one that might be used just as a
18 sheathing application, like one that's going to have
19 brick put up.

20 Q. What was the function -- is this what's
21 referred to in the scope of work under the -- in your
22 subcontract -- in Precision Walls's subcontract as blue
23 board insulation?

24 A. That is -- that is correct. And that is sort
25 of a common term. It's sort of a slang term that's been

1 used in our industry for years.

2 Q. Okay.

3 A. Because the actual board that was approved
4 was by Owens Corning, and it is pink, so...

5 Q. Pink board?

6 A. Yeah.

7 Q. And is that the Foamular product?

8 A. Yes, it is.

9 Q. What was the intended function of the rigid
10 foam insulation board?

11 A. Well, the architect was using it to achieve
12 his R-Value for his exterior wall. There is a trend in
13 our business now to eliminate what's known as batt
14 installation, the -- you know, the fiberglass stuff from
15 the wall cavity, because it affords easier work for the
16 electrician. If the wall needs to be penetrated, it --
17 it's just an open area. You are getting your R-value
18 outside of the wall instead of within the wall. It's
19 fairly common.

20 Q. And -- so it was to serve as wall insulation?

21 A. That is correct.

22 MR. OUZTS: Let's mark this as No. 2, please.

23 (Whereupon Exhibit No. 2 was marked for
24 identification.)

25 Q. Mr. Howell, let me show you what I've marked

1 as defendant's exhibit -- excuse me -- Deposition Exhibit
2 2, and ask you if you would, please, take a look at that
3 and tell me what that is.

4 A. It's -- these are copies of the returned
5 submittals from the architect that were sent back to SYS
6 marking that they had been reviewed.

7 Q. And there is a submittal included among the
8 submittals that were made with this are the -- are
9 submittals for the Owens Corning Fomular 150?

10 A. Yes.

11 Q. Which was the rigid insulation that we'd just
12 been referring to, correct?

13 A. That's correct.

14 Q. And also a seam & seal tape made by Berry
15 Plastics; is that correct?

16 A. That's correct. Yes, sir.

17 Q. Were -- was the fomular product specified by
18 brand or vendor specifically in the specifications?

19 A. I do not know without looking at it. I know
20 it was approved as an equal to what they wanted, but to
21 know that it was specifically listed, I would have to
22 look. I don't know.

23 Q. How do you know it was approved as an equal
24 if it was assumed that it wasn't specifically specified?

25 A. Because the architect approved it.

1 Q. And that's what the submittal process is
2 designed to do?

3 A. That is correct. Yes, sir.

4 Q. And its purpose is to get the architect and
5 the general corrector to say that the product that you
6 -- that Precision Walls is proposing to use meets the
7 specifications; is that accurate?

8 A. That's correct. Yes, sir.

9 Q. What about the seam & seal tape from Berry
10 Plastics? Was that specified or was that an equal
11 submittals.

12 A. It was an equal submittal.

13 Q. Okay.

14 A. Here again I don't know that he had a
15 specific tape specified. It may have just been more of a
16 generic description described as house wrapped tape or
17 builder tape. There's a bunch of different names for it,
18 but there again, I would have to look at the submittals
19 because I don't remember.

20 Q. Okay. But in any event, the document,
21 Exhibit 2, indicates that the Berry Plastic's seam & seal
22 tape was approved by both the general contractor and the
23 architect; is that correct?

24 A. That is correct. Yes, sir.

25 Q. While we are looking at this, I want to refer

1 you to the product data sheet for Fomular 150. And there
2 is -- and specifically the section that's labeled
3 technical information.

4 A. Yes, sir.

5 Q. Do you see the paragraph that says -- and
6 I'll just read it. "Fomular is a non-structural material
7 and must be installed on framings which are independently
8 structurally adequate to meet required construction and
9 serving loading conditions." Did I read that right?

10 A. Yes, sir, you did.

11 Q. Do you agree with that, that fomular is not a
12 structural element of the wall?

13 A. Absolutely.

14 Q. What was the function or intended function of
15 the seam & seal tape of Berry Plastics?

16 A. It basically provides a moisture barrier, an
17 intrusion barrier to water coming between the seams of
18 the boards.

19 Q. So it is -- where would it be installed?

20 A. On the tape, it would be installed on the
21 seams between the fomular boards.

22 Q. Only at the joint?

23 A. That's correct.

24 Q. Correct?

25 A. Uh-huh. Yes, sir.

1 Q. And how wide a strip of tape would the...

2 A. It's two inches wide.

3 Q. All right. And likewise, it has no
4 structural function --

5 A. That's correct.

6 Q. -- in terms of the performance of the wall,
7 correct?

8 A. That is correct.

9 MR. OUZTS: How long have we been going? Do
10 you have a watch handy?

11 MR. MCDONALD: Not quite an hour.

12 MR. OUZTS: Okay. We'll continue for a
13 little while then. Are you fine to go? Do you
14 need to take a break?

15 THE WITNESS: I'm fine.

16 Q. Do you recall when the issue on the
17 Tri-County project arose concerning the performance of
18 the seam and seal tape?

19 A. Yes, I do.

20 Q. Approximately, when did that first arise?

21 A. Well, I remember the phone call specifically,
22 but the date I don't remember.

23 Q. Well, let me see if I can show you a document
24 to give you some frame of reference.

25 A. Because I have got a copy of an e-mail that

1 DJ sent me on February the 8th.

2 MR. OUZTS: You wouldn't happen to have a
3 stapler on you?

4 COURT REPORTER: No, I don't. I'm sorry.

5 MR. OUZTS: Okay. Let's mark this as
6 defendant's -- excuse me -- Deposition Exhibit 3.

7 (Whereupon Exhibit No. 3 was marked for
8 identification.)

9 Q. What I have marked as Deposition Exhibit 3,
10 Mr. Howell, is a series of e-mails that begins on January
11 19, 2010 and going all the way through October the 25th
12 of 2010. Let me show you -- let me show you this exhibit
13 and ask you if you would just read from back to front.
14 And really the time period I'm most concerned about right
15 now is this January to February timeframe. Of course you
16 are welcome to read the whole thing. If you can take a
17 look at that for me, and I have a few questions to ask
18 you.

19 MR. OUZTS: Chuck, I'm sorry. I do have a
20 copy. I think I have a copy. I'll tear it apart.
21 Just let me know when you are ready.

22 THE WITNESS: I am ready.

23 Q. All right. The e-mail string starts on
24 January the 19th with an e-mail from Randy Hug to David
25 Herring; is that right?

1 A. Yes. Uh-huh.

2 Q. Do you know who Randy Hug is?

3 A. Yes, sir. Randy Hug was -- at that time, he

4 was our sales rep for L&W Supply, also known as CK

5 Supply.

6 Q. Okay. And who was David Herring? Do you

7 know who that is?

8 A. I'm not sure.

9 Q. All right.

10 A. I think David -- I think he worked for Owens

11 Corning, but I don't know. I don't know him.

12 Q. And David -- I mean -- excuse me. Randy is

13 asking David for information about what Owens Corning

14 sent to Pete Hubbard about insulation tape; is that

15 correct?

16 A. That is correct.

17 Q. And they were -- they were -- Randy -- there

18 was a -- I take it from this string of e-mails that the

19 question was what tape Owens Corning would recommend for

20 use with the fomular insulation board; is that

21 essentially correct?

22 A. That's what I understand. Yes, sir.

23 Q. And there was a response on January 20th from

24 a person named Terri Poland from Owens Corning, correct?

25 A. Yes.

1 Q. And that was forwarded from -- and I don't
2 know -- is Terri Poland -- do you know him or her?

3 A. I do not.

4 Q. Okay.

5 A. I do not.

6 Q. The response that was received from Terri
7 Poland was then forwarded to you and Jimmy Taylor,
8 correct?

9 A. That is correct.

10 Q. On January the 20th of 2010, correct?

11 A. Yes.

12 Q. All right. Why were -- why were you or why
13 was Precision Walls interested to know what Owens Corning
14 had told Pete Hubbard about the insulation tape or use of
15 the Owens Corning board?

16 A. It was my understanding that it was just
17 verification of the tape that we were using was the equal
18 to that even though it had been approved. And obviously,
19 if my memory serves me correctly, Pete is no longer with
20 the company at this time.

21 Q. Right.

22 A. And so that was one reason for that, because
23 there was -- I don't remember who in our office was doing
24 it, but we were trying to find a copy of everything on
25 that job on our computer, so it -- it's basically just a

1 verification.

2 Q. Had the problem with the insulation tape on
3 the Tri-County Tech site already arisen as of the time of
4 these e-mails in January of 2010?

5 A. Yes.

6 Q. Okay. And was it -- is it fair to say that
7 this exchange of e-mails was part of what Precision Walls
8 was doing to try to investigation that issue?

9 A. Yes.

10 Q. Were you ever able to find the information
11 that had actually been given to Pete Hubbard as part of
12 the bid process?

13 A. The information that was given to Pete as
14 part of the bid process?

15 Q. Let me be more accurate with my question.

16 The -- I'm referring here to the first
17 e-mail in this string, and I'll just read it. It's from
18 Randy Hug to David Herring. It says:

19 "David, a while back you sent me an e-mail of
20 what Owens Corning suggest to use to tape rigid
21 insulation. Pete with p walls wanted the info, he is no
22 longer there and now they are looking for the info
23 again."

24 So what I'm interested -- my question really
25 is: Where is the information that was originally

1 provided to Pete with regard -- as referenced in this
2 e-mail?

3 A. I don't know.

4 Q. What happened -- well, let me -- again, I'm
5 trying to take this step by step, and I want to be
6 accurate. So let me just refer you to a document here.

7 MR. OUZTS: Here is a copy.

8 (Whereupon Exhibit No. 4 was marked for
9 identification.)

10 Q. Let me hand you what I've marked as
11 deposition Exhibit No. 4, Mr. Howell. You can take a
12 minute to read that.

13 A. Okay.

14 Q. Do you remember receiving this e-mail?

15 A. Yes, I do.

16 Q. Tell me what the problem was in your own
17 words at that time with that insulation tape.

18 A. To the best of my memory, the building was --
19 the exterior was completely framed except for an
20 occasional hole in the exterior wall that had been left
21 out for some reason at the direction of the general
22 contractor. For most part, the building was sheathed
23 with the Securock, and for the most part had the pink
24 board or the polystyrene sheathing board on top of that.

25 Q. That would be the fomular?

1 A. The fomular board, yes, sir. We had applied
2 tape to the sheathing joints. I -- whether we had done
3 all four sides or not, I don't remember. We had done
4 quite a bit of the work. The tape was losing adhesion,
5 and we were at -- at some point along that timeline, we
6 were directed by SYS that they didn't like the fact that
7 the tape was losing adhesion. They directed us to change
8 and use a bituthene tape. It's the best description I
9 can give you for it. That's what we know it as. It's a
10 -- it's sort of a rubber-based type tape that has
11 supposedly super adhesion.

12 We did that at their direction, but by that time
13 that they were concerned about the tape losing adhesion
14 on the areas they could see, the brick mason had started
15 on one end of the building, and I'm almost positive he
16 had that whole end. It would have been if you were
17 facing the building, the left-hand end had been
18 completely bricked which promoted them to issue this
19 letter to me stating they were going to do a forensic
20 review from the interior side and cut a hole in the
21 sheathing to put a camera in and see if the tape had lost
22 adhesion there.

23 Q. All right. Well, let me -- let me ask a few
24 more follow-up questions regarding to that just to make
25 sure I understand. This is -- this project involved a

1 construction of one building?

2 A. That's correct.

3 Q. All right. And in terms of the sequencing of
4 the work, as I understand it, Precision Walls put up
5 framing, put up the sheathing, the Securock, put up the
6 blue board -- or pink board --

7 A. Yes.

8 Q. The fomular --

9 A. That's correct.

10 Q. -- tape the -- the seams --

11 A. Yes.

12 Q. -- and then the brick mason started his work
13 coming along behind Precision Walls?

14 A. Yes, that's correct. At the determination of
15 the general contractor, once we were considered to be far
16 enough ahead of the brick mason to give him adequate work
17 area, he was then directed to start on the left end of
18 the building.

19 Q. And what was he doing?

20 A. Well, I mean, he would erect scaffolding,
21 applies brick ties and then they would start mixing
22 mortar and putting brick up.

23 Q. And this was brick veneer?

24 A. I'm not sure what you mean by veneer.

25 Q. Was it just the brick facing?

1 A. That's correct.

2 Q. Okay.

3 A. Yeah. It's just a standard -- what you call
4 a standard brick. It's not a thinset brick like you see
5 in some applications in construction. It would be
6 considered a regular size brick.

7 Q. Was the brick in contact with the -- with the
8 fomular insulation board or was there a space between
9 those two?

10 A. No, sir. The brick -- the brick ties would
11 allow them a two inch air space. And the air space
12 occurred between the face of the rigid sheathing or the
13 -- I'm sorry, the fomular and the brick.

14 Q. And how was the brick tied into the framing?

15 A. Through the brick ties.

16 Q. Okay. What would the brick ties connect to?

17 A. To our framing.

18 Q. To the medal framing underneath?

19 A. Yes, sir.

20 Q. As I understand this e-mail, Deposition
21 Exhibit No. 4, the loss of adhesion of the tape was first
22 observed on sections of the walls that had -- at which
23 the brick had not yet been installed; is that correct?

24 A. That's my understanding, but I -- that's my
25 understanding, yes, sir.

1 Q. And the purpose of this -- this -- what they
2 referred to as a forensic review was to attempt to
3 determine without damaging the wall on the exterior
4 whether or not the tape was also losing adhesion behind
5 the brick veneer?

6 A. That is correct.

7 Q. And so they went into the wall through the
8 sheetrock or through the drywall on the --

9 A. No. The sheetrock had not been hung at that
10 time on the interior portion of the building, so they had
11 an open cavity --

12 Q. Uh-huh.

13 A. -- so basically when you went inside the
14 building, you were looking through the studs on the
15 backside of the secure rock sheathing.

16 Q. All right. So the holes that they put in
17 were through the Securock and the fomular?

18 A. And the fomular, yes, sir.

19 Q. Fomular.

20 A. Uh-huh.

21 Q. It's easier to refer to that as pink board.

22 A. Yeah, it is.

23 Q. Now, as I understand it, the installation of
24 the brick as of that point in time had not been completed
25 on all elevations; is that right?

1 A. Oh, yes. That's correct.

2 Q. Did you attend this forensic review on, I
3 believe, February the 3rd?

4 A. I did.

5 MR. OUZTS: (To the court reporter) Let's
6 mark this as defendant's -- or Deposition No. 5.

7 (Whereupon Exhibit No. 5 was marked for
8 identification.)

9 Q. I'm going to show you what's been marked as
10 Deposition Exhibit No. 5, Mr. Howell, and ask you if you
11 can identify that document for me.

12 A. Okay.

13 Q. What is the -- what is that?

14 A. This is just like a summary of the meeting
15 that took place on February the 3rd of which I was in
16 attendance.

17 Q. Okay. And I want you to read to yourself the
18 section called Purpose of the Meeting. And I want -- let
19 me know if there's anything in that statement that you
20 consider to be inaccurate.

21 A. I agree with that.

22 Q. So you agree with that description?

23 A. Yes, sir. I do.

24 Q. There is a -- the last page in that document
25 is some elevation drawings --

1 A. Uh-huh.

2 Q. -- where the shaded areas are areas where the
3 tape was behind the -- already behind the veneer. Is
4 that consistent with your recollection of where the
5 construction or the installation of the brick walls stood
6 at that time?

7 A. Yes, it is.

8 Q. So portions of it were covered with brick
9 veneer but not all of it had been --

10 A. That is correct.

11 Q. Okay. Based on your observations at the
12 onsite inspection that day, was there any damage as of
13 that time to the brick veneer wall?

14 A. No, sir, not that I saw.

15 Q. Was the brick veneer that was in place fully
16 intact as of that time?

17 A. To the best of my knowledge, it was.

18 Q. To the best of your knowledge, did the loss
19 of adhesion of the tape insulation at the joints of the
20 pink board have any affect on the performance of the
21 brick veneer wall?

22 A. I don't know. Other than the fact it was
23 there for a moisture barrier, so, you know, the way I
24 understand it, the reason for all this was that if
25 moisture did get through the brick and penetrate that,

1 that was the whole thing of the whole matter was water
2 intrusion.

3 Q. Did the -- did the lack or the loss of
4 adhesion of the insulation tape underneath the brick
5 veneer have any effect on the structural integrity of the
6 brick veneer wall?

7 A. No, not to my knowledge. No.

8 Q. One of the people in attendance -- well, hold
9 on. Hold that thought a minute.

10 Do you remember a person named David Lewsey?

11 A. Yes, I do.

12 Q. Lewsey?

13 A. Yes, I do.

14 Q. Who was David Lewsey?

15 A. He was a representative of Owens Corning
16 based out of Charlotte, North Carolina if I remember
17 correctly.

18 Q. Was he present for this inspection --

19 A. Yes, he was.

20 Q. -- on February 3rd?

21 A. Yes.

22 Q. Did you talk to Mr. Lewsey?

23 A. Yes, I did.

24 Q. What did Mr. Lewsey have to say about the --
25 the issue with the insulation tape?

1 A. Best I can remember, there was two distinct
2 things that he said. He said, number one, that Owens
3 Corning would not recommend to use that tape on those --
4 on that particular application which would be applied to
5 the insulation. When he was informed that we had a
6 letter from a representative for his company that said
7 that it was correct, and he said that he doubted that to
8 the best of my knowledge, something to that affect. We
9 then sent him a copy of the e-mail which contained the
10 information from Mr. or Ms. Terri Poland. I don't know
11 who it was. He also --

12 Q. Those were the e-mails that we talked about
13 earlier --

14 A. That's correct.

15 Q. -- in the deposition?

16 A. Yes, sir.

17 Q. Okay.

18 A. And he also made the statement that he didn't
19 feel like that tape was even needed because the joints
20 were staggered between the Securock sheathing and the
21 fomular board. And the question was asked would he be
22 willing to put that in writing and sign his name to it
23 and to help cover that building as far as insurance goes
24 because the general contractor -- and I don't know the
25 exact time period, but they have to cover construction of

1 a new building, I don't know, 10 or 12 years, something
2 like that, at which point he stated no. He would not do
3 that. So...

4 Q. Who did Mr. Lewsey tell this to?

5 A. It was the people standing in the -- around
6 for the meeting, DJ, Rob, Stacy. I don't know if Chris
7 or the guys from Neal Prince were standing there. I just
8 don't remember. It was a group of people.

9 MR. OUZTS: Chuck, I want to make this an
10 exhibit. There is probably going to be some
11 overlap here. It's hard to deal with these
12 e-mails. Let's mark this as Deposition Exhibit 6.

13 (Whereupon Exhibit No. 6 was marked for
14 identification.)

15 Q. Let me just show you what's marked at
16 Deposition Exhibit 6, Mr. Howell, string of e-mails.

17 A. Okay.

18 Q. The top -- the last e-mail -- well, let me
19 back up.

20 On February the 12th, you sent an e-mail to
21 David Lewsey -- no, excuse me. Jimmy Taylor sent an
22 e-mail to David Lewsey with a copy to you which showed
23 Mr. Lewsey the e-mails that had been sent by Terri Poland
24 earlier.

25 A. That is correct.

1 Q. And that --- and you were submitting that to
2 him to document that Owens Corning had recommended that
3 any house tape could be used to seal the seams of their
4 fomular board, correct?

5 A. Yes. That is correct.

6 Q. And then on November the 30th of 2010, you
7 forwarded that information to JJ Williams at Liberty
8 Mutual, correct?

9 A. Yes, I did.

10 Q. And you recounted for Mr. Williams the
11 conversation that -- or statements that had been made by
12 David Lewsey at the site, correct?

13 A. That is correct.

14 MR. OUZTS: Let's mark this as -- Chuck, I am
15 looking for an extra copy of this one. I'm not
16 sure I have one.

17 MR. MCDONALD: That's all right.

18 MR. OUZTS: Let's mark this as Deposition
19 Exhibit 7?

20 COURT REPORTER: Yes.

21 (Whereupon Exhibit No. 7 was marked for
22 identification.)

23 MR. OUZTS: And Chuck, since I don't have
24 another copy, I'll represent to you that it's the
25 same set of e-mails except there is a new one dated

1 November 30th to Jonathan Williams.

2 MR. MCDONALD: Okay.

3 Q. Do you recognize that e-mail, Mr. Howell?

4 A. Yes, I do.

5 Q. Okay. The one of November 30th that you sent
6 to JJ Williams, Jonathan Williams?

7 A. Yes.

8 Q. And the e-mail -- and you said in the e-mail
9 -- I'll just read it. It says:

10 "Jonathan, we felt this e-mail was of extreme
11 importance since it was coming from Owens Corning and
12 confirmed use of a house wrap tape." Did I read it
13 correctly?

14 A. Yes, you did.

15 Q. And why did you feel that was of extreme
16 importance?

17 A. I don't remember exactly how all that came
18 about, but I had had a few conversations with Jonathan,
19 and I was just trying to be as upfront with him as I knew
20 how. And I -- I just I don't remember if somebody had
21 questioned the equality of the tape. I have a feeling
22 that's probably what it was. I just don't specifically
23 remember, but it was to just to verify that the house
24 wrap tape was approved by Owens Corning and as referenced
25 by Terri Poland.

1 Q. In your mind, was the cause of the issue that
2 you were having or that the general contractor was having
3 with the insulation tape, the tape itself as opposed to
4 any sort of application issue?

5 A. Yes. To the best of my knowledge, it was the
6 failure of adhesion of the tape.

7 Q. Did Precision Walls at that time believe that
8 the manufacturer or supplier of the tape should bear
9 responsibility for the problem?

10 A. Obviously that was part our, you know, our
11 little internal investigation if you want to call it
12 that. It was to, you know, determine what caused the
13 failure of the adhesion, so you would look to the
14 manufacture to find out what's going on with that, so
15 yes.

16 Q. And so Precision Walls did that internal
17 investigation and concluded that the tape manufacturer
18 should be responsible?

19 A. Well, we -- I mean, yes. We determined that
20 the -- we had used the correct tape. That was the first
21 thing we wanted to verify. We saw the tape was losing
22 adhesion on the building, you know, on the parts of the
23 building that hadn't been bricked. So, yes, we felt
24 that, you know, there was a problem with that product.

25 Q. Are you aware of anything that Precision

1 Walls did in connection with the installation or
2 application of the tape that was improper?

3 A. No, not to my knowledge. I mean I was not on
4 site very often, but no.

5 Q. Had -- as a result of its own investigation,
6 did -- during this time, did Precision Walls have any
7 communication with Berry Plastics, the supplier of the
8 tape, about this problem?

9 A. We had a rep who was at that same meeting
10 that David Lewsey was at.

11 Q. On February the 3rd?

12 A. Yes. He was sent to us as a -- supposedly he
13 was a representative of Berry Plastics. What it turned
14 out he was was a manufacture's rep who represents many
15 different products within the construction industry. He
16 was noncommittal during the whole thing. He did not say
17 anything that I can remember of any importance at that
18 meeting.

19 Q. Who invited him to attend?

20 A. I think it was Pete, but I'm just not sure.
21 There was, you know, obviously there was contacts that
22 were made trying to figure out who would be our
23 representative for this area that we are in and that name
24 was provided to us and I just don't remember. It could
25 have been me that called him. I just don't remember.

1 Q. What was his name?

2 A. I don't remember. I may have his business
3 card back at my office, but I do not remember his name.

4 Q. Does the name Mike Fields ring a bell with
5 you?

6 A. Yes, but I think Mike Fields was the regional
7 guy. I think he was based out of Virginia, and I think
8 he was the guy we sent a letter to about this issue to
9 the best of my knowledge.

10 Q. Okay. And you think that Mike Fields was not
11 the person who was on the site on February the 3th?

12 A. That's correct. That's what I think, yes.

13 Q. And if I understood your testimony correctly,
14 you understood that this representative who attended the
15 site inspection on February 3rd was not Berry Plastics
16 but a representative of the tape manufacture?

17 A. That is correct. He sells Berry Plastics
18 products along with many other kinds.

19 Q. Oh, I see.

20 A. He's like an independent sales rep.

21 Q. I see. So Berry -- it's your understanding
22 that Berry Plastics was the manufacturer of the tape?

23 A. That's correct.

24 Q. All right.

25 MR. OUZTS: Let's take a short break, say

1 maybe ten minutes.

2 MR. MCDONALD: That would be fine.

3 (Whereupon a break was taken.)

4 BY MR. OUZTS:

5 Q. All right. We were talking about Precision
6 Walls investigation of the tape issue that arose at
7 Tri-County Tech, and you indicated that Precision Walls
8 wrote a letter to the tape manufacturer.

9 A. Uh-huh.

10 Q. Correct?

11 A. Yes.

12 Q. Who wrote that letter and who was it sent to?

13 A. To the best of my memory, I wrote it and I
14 think it was sent to Mike Fields, because I think that
15 was the regional guy that was based out of Virginia.

16 Q. Do you have a copy of that letter?

17 A. I do not.

18 Q. Do you know whether a copy of that letter is
19 in the Precision Walls project file for this job?

20 A. I don't know, but I can find out.

21 Q. Okay. I would appreciate it if you would.

22 When did you write the letter, approximately?

23 I know you can't remember the exact date.

24 A. Well, it was before the meeting. The best I
25 can remember, it was before the onsite meeting we had

1 that SYS conducted which was on February the 3rd.

2 Q. Uh-huh.

3 A. I think it would have been in January.
4 Specific date, I don't know.

5 Q. And tell me as best you can recall what the
6 letter said.

7 A. Best I can recall, we referenced the job and
8 the tape losing adhesion. I'm sorry. I just -- I just
9 don't remember.

10 Q. Do you remember whether you asked Berry
11 Plastics to do anything in particular with regard to the
12 problem?

13 A. I think I asked them to some -- in some way
14 to provide representation, send someone to look at the
15 project to investigate the tape itself.

16 Q. Uh-huh.

17 A. That was the gist of it.

18 Q. As of the time of the meeting on February the
19 3rd onsite, had Precision Walls hired a lawyer to help
20 them on the issue?

21 A. No.

22 Q. Do you know when Precision Walls first
23 retained a lawyer to help on this problem?

24 A. I do not.

25 Q. Would you have been the person responsible

1 for making that decision to hire a lawyer?

2 A. No, sir. I would provide input to that.

3 Q. And who would make the decision to do it?

4 A. Well, it could be several people, but,
5 primarily, Gary Roth, Brian Allen.

6 MR. MCDONALD: May we go off the record for a
7 second.

8 MR. OUZTS: Certainly.

9 (Whereupon a discussion was held off the
10 record.)

11 BY MR. OUZTS:

12 MR. OUZTS: Let's mark this as Deposition No.
13 8.

14 (Whereupon Exhibit No. 8 was marked for
15 identification.)

16 Q. Let me show you, Mr. Howell, what I've marked
17 as Deposition Exhibit No. 8. If you could take a look at
18 that, I've got some questions about it.

19 A. Okay.

20 Q. What is that document?

21 A. It's a letter from DJ Doherty to myself.

22 This references that the tape had lost its adhesion on
23 polystyrene insulation and that they were going to remove
24 the brick and that they would hold, in their opinion,
25 would be held responsible for the removal and the

1 reinstallation of new brick on the area that had been
2 bricked already.

3 Q. Is this the first written notice that SYS
4 Constructors had given Precision Walls that they intended
5 to hold Precision Walls responsible for this problem?

6 A. To the best of my knowledge, yes.

7 Q. And I see on that same e-mail that you
8 forwarded that to Gary Roth on the -- on February the
9 12th, correct?

10 A. That is correct.

11 Q. What else did you do upon receipt of this
12 e-mail from DJ Doherty?

13 A. The best I can remember, we -- I talked to
14 Gary just to follow up and make sure he had a copy of the
15 e-mail, and -- because that same day, he sent us this
16 letter which was more official than the e-mail basically
17 putting us on notice for 48 hours.

18 Q. You are referring to -- what letter is that?

19 A. It's the same date as the -- well, it's a few
20 days afterwards. I'm sorry. The original e-mail was
21 sent on February the 8th. I forwarded that on February
22 the 12th. That letter is dated February the 12th. It's
23 basically restating here, but he's referencing our
24 contract and we had to take corrective action to...

25 Q. Did you bring this with you, or is it part of

1 the earlier exhibits?

2 MR. OUZTS: Let's go off the record.

3 (Whereupon a discussion was held off the
4 record.)

5 BY MR. OUZTS:

6 (Whereupon Exhibit No. 9 was marked for
7 identification.)

8 Q. All right. When you referred a formal letter
9 on the same date of your e-mail to Gary Roth, is this
10 Exhibit 9 the letter that you are referring to?

11 A. That's correct.

12 Q. All right. Let me look back for a minute at
13 this e-mail. And at the end of it, it says -- and I'll
14 just read this sentence. Is says:

15 "If corrective action is required to change the
16 tapes behind the brick veneer, that all work associated
17 with that change would be at the expense of Precision
18 Walls."

19 Do you know as of February the 8th, the date of
20 this e-mail, whether or not SYS had made a decision to
21 take down the brick in order to gain access to the tape?

22 A. No, sir. I do not know.

23 Q. Did -- did Precision Walls make any effort to
24 persuade the -- persuade SYS and the architect and the
25 owner that it was not necessary to replace the tape

1 underneath the brick veneer?

2 A. I had a conversation with DJ, and I think it
3 was DJ, Rob and Stacy were at the job site in the
4 trailer. And we were discussing that, because that --
5 because we did ask them about the staggering of the
6 joints, that that would be sufficient. And I may be
7 getting my timeline mixed up a little bit, but the
8 conversation with Mr. David Lewsey, the day we were
9 onsite, and David Lewsey said that, you know, you really
10 didn't need it. It was because of the staggered joints.
11 And he just asked in sort of a sarcastic way, would he be
12 willing to, you know, cover the insurance on that
13 building from water intrusion for the 10 or 12 years
14 mandated by South Carolina law, and, of course, he said
15 no. But we did have some conversation about that as to
16 the removal of the brick, and the way it was represented
17 to me was SYS was in no other position but to have to
18 tear the brick off to protect their interest as far as
19 the water intrusion through that. So that was basically
20 the gist of our conversation.

21 Q. Were you aware of anything in the fomular
22 submittal that was made or in the fomular installation
23 instructions or their own guideline specifications or any
24 other document from Owens Corning that requires the use
25 of seamed tape with their fomular product?

1 A. I'm not. I'd have to go back and read the
2 specs, because they are pretty extensive. And I don't
3 know if they say that it's required under every
4 application or if it's -- if it's a -- an alternate that
5 could be provided to that. There's alternate
6 construction methods.

7 Q. Right.

8 A. And for example, one alternate method is to
9 put a layer of building wrap between the sheathing and
10 the rigid fomular board which I have seen. I've seen
11 this where it does not require that the fomular be taped
12 because the building wrap is taped. There is multitudes
13 of applications, so I doubt that they would ever tell you
14 that it's required to tape their joints at all times.

15 Q. Uh-huh. And what you were told by Mr. Lewsey
16 is that if you staggered joints, the tape would not be
17 necessary?

18 A. Yes.

19 Q. And is it accurate to say that staggering the
20 joints of any sort of board that's being installed over
21 another board so that the joints don't line up is common
22 construction practice?

23 A. That is correct.

24 Q. So is it fair to say that SYS and the
25 architect, their primary concern was to match what was

1 done by Precision Walls precisely and strictly to their
2 specifications?

3 A. That's correct.

4 Q. And they weren't willing to make any sort of
5 accomodation even if persuaded that by the manufacture of
6 the insulation board that the tape wasn't necessary?

7 MR. MCDONALD: Object to the form of the
8 question.

9 MR. OUZTS: You can answer.

10 A. I can't really say that because if I remember
11 correctly, Lewsey made a comment -- David Lewsey made a
12 comment, "Well, that's my personal opinion." And so he
13 sort of recanted what he said to begin with, so I just
14 don't see Owens Corning coming out and issuing a letter
15 and saying, you know, that that's -- you don't need it.
16 You don't need the tape. There is too many variables.

17 (Whereupon Exhibit No. 10 was marked for
18 identification.)

19 Q. Mr. Howell, look at Exhibit No. 10 if you
20 would, please, and just tell me what that is.

21 A. This is just a correspondence that took place
22 between myself and DJ about having the fomular rep attend
23 the meeting. And then, you know, DJ asked about having a
24 rep from Berry Plastics.

25 Q. Okay. So DJ -- okay. And this is for

1 another meeting that you all were going to have on the
2 project?

3 A. No, sir. This was -- I'm looking at the
4 dates here. Bear with me for just a minute. This was in
5 reference to the onsite meeting we had, because David
6 Lewsey had been called for jury duty. I remember that,
7 and this was in reference to that and that was when we
8 were trying to get everybody together because the meeting
9 had to be postponed for a day or two because of Lewsey
10 being on jury duty in Charlotte.

11 Q. So you are saying the meeting -- the onsite
12 meeting did not take place on February the 3rd?

13 A. Well, let's see if I can...

14 MR. MCDONALD: Five I believe it is.

15 Q. Yeah. Exhibit 5 is the memo on February the
16 4th that describes the test or the inspection that was
17 done with the flexible camera on February -- on the day
18 before; is that correct?

19 A. You know what, I was mixed up, because we had
20 this meeting on February the 3rd which was between SYS
21 and our representatives. And then we -- after they did
22 the forensic, the -- put the camera in the wall, then
23 they -- we decided to bring out the Owens Corning rep and
24 the rep from -- or try to get a rep from Berry Plastics.
25 I was mistaken on that.

1 Q. And that would have been -- that was -- and
2 the meeting that you were trying to arrange with David
3 Lewsey and the Berry Plastics rep was the subject of this
4 e-mail on February the 10th?

5 A. Yes. That is correct.

6 Q. And did that meeting happen?

7 A. Yes, it did.

8 Q. Do you remember when?

9 A. Well, we received the letter from DJ on
10 Friday if I'm -- I think that's a Friday, February the
11 12th. I would have to look back. I'm pretty sure that
12 he issued that letter. That meeting occurred somewhere
13 around February the 12th. I don't know if it was the day
14 before or that day. I just don't remember.

15 Q. Did someone -- I think you testified earlier
16 that someone from Berry Plastics or that you believed to
17 be from Berry Plastics also attended this meeting?

18 A. Well, he represented himself not as an
19 employee of Berry Plastics but a manufacture's rep --

20 Q. Okay.

21 A. -- for Berry Plastics.

22 Q. All right. So who was present besides, I
23 guess -- was David Doherty there?

24 A. DJ Doherty, yes, DJ, Rob Moore, Stacy, I
25 can't remember his last time, Jimmy Taylor and of course

1 myself, the gentleman from -- the rep for Berry Plastics
2 and David Lewsey.

3 Q. Okay. What number did I put on the letter of
4 February the 12th?

5 A. 10. Oh, I'm sorry. Nine.

6 MR. MCDONALD: Nine.

7 Q. Nine?

8 Let's look at that a minute. I've got a
9 question about that.

10 A. Okay.

11 Q. In the last sentence -- excuse me. The last
12 paragraph of that letter -- and I will just read it or
13 part of it. It says, you have 48 hours, you, Precision
14 Walls, have 48 hours to begin correcting the deficiency.
15 Please provide a written correspondence regarding the
16 method of correcting the deficiency in addition to
17 correction of the defect by the end of business, Tuesday
18 February 16th 2010. Should you fail to do so, SYS will
19 begin correction of the deficiency and will look for
20 Precision for any losses incurred as a result thereof.
21 Did I read that correctly?

22 A. Yes.

23 Q. Did Precision Walls present its own suggested
24 method of correcting the deficiency?

25 A. To the best of my memory, the directive to

1 begin replacing the tape on the area that had not been
 2 bricked had already started taking place. That was the
 3 Bituthene tape that I referenced earlier. That is what
 4 was replaced once the brick was torn down. That tape was
 5 replaced with the Bituthene tape. The directive to use
 6 the Bituthene tape the first time I heard it was from
 7 Stacy, I believe. Stacy Phillips was the superintendant,
 8 and that was what we proceeded to buy and install. That
 9 was the directive we were given by SYS.

10 Q. Did SYS as of this date direct that the brick
 11 veneer be taken off the wall where it had been installed?

12 A. As of February the 12th?

13 Q. Yes, sir.

14 A. I don't know. I just don't remember the
 15 exact date.

16 Q. Did Precision Walls ever propose to SYS, the
 17 architect or the owner an alternate method of repairing
 18 the tape behind the brick veneer?

19 A. No, sir.

20 Q. Or replacing the tape behind the brick
 21 veneer?

22 A. No, sir.

23 Q. Did Precision Walls ever file a written
 24 objection with the general contractor or the architect
 25 pursuant to the subcontract of the -- of the intention

1 and ultimate change order attempting to charge Precision
2 Walls for that work?

3 A. No, sir.

4 Q. Did Precision Walls ever try to seek any sort
5 of arbitration or dispute resolution procedure to resolve
6 any dispute about whether or not the -- it was necessary
7 to take down the brick in order to get to the tape?

8 A. No.

9 Q. Was the sole reason for the SYS requiring the
10 removal of the brick veneer to gain access to the tape
11 underneath so that it could be removed and replaced with
12 this Bituthene tape?

13 A. To the best of my knowledge, yes.

14 Q. And there was nothing wrong with the brick
15 veneer wall itself?

16 A. No, sir. Not to my knowledge.

17 MR. OUZTS: Let's go off the record for just
18 a minute.

19 (Whereupon a discussion was held off the
20 record.)

21 BY MR. OUZTS:

22 Q. Do you recall when approximately the date
23 that -- that Pride Masonry started to remove the brick
24 veneer from those sections of the wall where it was
25 already up?

1 A. To the best of my knowledge, it would have
2 been in mid-February.

3 MR. OUZTS: All right. And let me -- let's
4 mark this as 11.

5 (Whereupon Exhibit No. 11 was marked for
6 identification.)

7 Q. Mr. Howell, let me show you what I've marked
8 as Exhibit 11. Can you identify that document for me?

9 A. Yes, sir.

10 Q. What is that?

11 A. It's a -- basically a letter to withhold
12 money from our payments regarding removing of the masonry
13 and the added time as they perceived as far as their
14 project management and dumpster bills, things like that
15 for what they intended to withhold from us.

16 Q. And this amount of \$119,418.00, is that based
17 on SYS's estimate of the work that was to be done?

18 A. To the best of my knowledge, yes.

19 Q. It says here that it's important to
20 understand the full effects can not be known at this time
21 and could potentially increase as the full effects are
22 understood and the work -- and the work had not been
23 completed --

24 A. Yes.

25 Q. -- as of that date; is that correct?

1 A. Yes, that's correct.

2 Q. All right. And that number, \$179,419.00
3 doesn't represent actual cost, correct?

4 A. That's correct.

5 Q. Did you -- do you have -- as someone who has
6 done estimation work yourself, do you have an opinion
7 about whether or not that amount withheld was excessive
8 or not for the work that was to be done?

9 MR. MCDONALD: Steve, I don't want to muck up
10 the deposition, but can we talk outside for just a
11 second?

12 MR. OUZTS: Certainly.

13 (Whereupon a discussion was held off the
14 record.)

15 BY MR. OUZTS:

16 Q. Mr. Howell, let's go back to the question I
17 asked you.

18 Did you think that this withholding amount was
19 excessive for the work that was being done by Pride?

20 A. I don't know about the masonry price. I
21 would fully expect, being the business that I'm in, that
22 they padded their number to make sure they were covered.

23 Q. Okay. Well, let me put it -- let me ask it a
24 different way: Is this amount something that you believe
25 Precision Walls would have paid to SYS without objection

1 for the work that was done?

2 A. No, sir.

3 MR. OUZTS: What is this? Number 12?

4 COURT REPORTER: 12.

5 (Whereupon Exhibit No. 12 was marked for
6 identification.)

7 Q. I want to show you what we've marked as
8 Deposition Exhibit 12. And my question is, first, do you
9 recognize that document?

10 A. Yes.

11 Q. And what is that?

12 A. It's the bill from Pride Masonry of Gaffney
13 for the breakdown of their charges as far as the demo of
14 the brick and the -- a projective savings of the
15 reinstallation.

16 Q. So this -- if I'm understanding this letter
17 correctly, this is Pride Masonry's breakdown of the
18 demolition work; is that correct?

19 A. That is correct.

20 Q. And not the -- and not the replacement of the
21 brick, correct?

22 A. That's correct.

23 Q. And based upon the cost of demolition, which
24 is now set, I guess, as of this date, they give a revised
25 price for the demo and replacement of the brick work of

1 \$85,829.00.

2 A. Yes.

3 Q. Is that right?

4 A. That's correct.

5 Q. Does this letter indicate to you that the
6 replacement of the brick had not taken place or not been
7 completed as of this date?

8 A. Yes. It would seem to indicate that.

9 MR. OUZTS: (To the court reporter) Number
10 13, please.

11 (Whereupon Exhibit No. 13 was marked for
12 identification.)

13 Q. Let me show you this document that I've
14 marked as Exhibit 13, Mr. Howell. And my question,
15 first, is can you identify that document for me?

16 A. Yes. This is the final bill from Pride
17 Masonry.

18 Q. Okay. And does this -- does this letter
19 provide a breakdown of the -- well, let me -- of the cost
20 of replacing the brick work that had been removed?

21 A. That is correct.

22 Q. So is it your understanding based on this
23 letter and also based on being the general manager of
24 Precision Walls during this time that the brick work --
25 that the removal and replacement of veneer had been

1 completed by July the 26th, 2010?

2 A. Yes, that is my understanding.

3 Q. Now the total combined cost according to this
4 letter for the removal and replacement of the brick was
5 \$84,427.00; is that correct?

6 A. Yes.

7 Q. Okay. That amount does not include any mark
8 up or supervision charges or anything else that SYS
9 planned to charge Precision Walls is it?

10 A. That's correct.

11 MR. OUZTS: (To the court reporter) Number
12 14, please.

13 (Whereupon Exhibit No. 14 was marked for
14 identification.)

15 Q. Mr. Howell, I want to show you Exhibit 14 and
16 ask you what that document is.

17 A. It's a copy of an SYS subcontract change
18 order for masonry demo and rebuild plus their time,
19 project management, superintendant and dumpster bills.

20 Q. And so this subcontract change order is --
21 represents SYS's demand to Precision Walls for payment
22 for the demolition and replacement of the brick veneer
23 wall; is that right?

24 A. That is correct.

25 Q. And is this the first change order that was

1 issued by SYS on that subject?

2 A. Yes.

3 Q. And what is -- explain for me, if you could,
4 how the change order process works.

5 A. Well, whether it's an addition or a
6 deduction, you know, they issue us a -- on their change
7 order form amounts that are to be added, stuff they've
8 asked us to price for them or a deductive change order as
9 far as this goes which, in this case, they would withhold
10 from our contract amount.

11 Q. Okay. So this subcontract change order was
12 issued by SYS to Precision Walls saying that the general
13 contractor, SYS, planned to withhold from the amount due
14 to Precision Walls \$108,845.00 for the brick work that
15 was done?

16 A. Yes.

17 Q. The extra brick work that was done?

18 A. That's correct.

19 Q. And is there a procedure by which Precision
20 Walls can contest a deductive change order such as this?

21 A. I don't have full knowledge of the contract.
22 I mean I'm assuming there is, but I'm not an expert in
23 the legal end of it, so...

24 Q. Okay. Well, just putting the exact terms of
25 the contract aside for the moment and let's just talk in

1 terms of your experience in the construction business, is
2 there a way for a subcontractor who has issued a
3 deductive change order such at this to challenge the --
4 or contest the deduction?

5 A. Yes.

6 Q. And how is that done in general?

7 A. Well, it typically starts off with a phone
8 call or a person-to-person meeting where you talk about
9 rates or you talk about the work that was done or, you
10 know, it could be a multitude of things.

11 Q. Do you know whether or not Precision Walls
12 took any effort to contest this deductive change order
13 either in amount or otherwise?

14 A. Yes, we did as far as negotiations about the
15 amount. And that was where -- I was involved in it at
16 the beginning, I guess you could say, but, you know, Gary
17 became involved in, you know, in the dollar amount and
18 what was going to be negotiated as the final deductive
19 change order.

20 Q. Okay. So this particular subcontract change
21 order was not signed by Precision Walls as of this date
22 when it was issued, September 27, 2010?

23 A. No.

24 Q. There were further negotiations about the
25 deduction?

1 A. That is correct.

2 Q. What was the basis of the further
3 negotiation?

4 A. Well, to my understanding, I mean, it's to
5 protect our interest legally and trying to protect our
6 interest to the best possible way of getting paid. So
7 you know, that was the -- just protecting our interest.

8 Q. Did Precision Walls believe that the
9 deduction was too great an amount?

10 A. Well, I can't speak for everybody with
11 Precision Walls. I mean, as far as I am concerned, I
12 guess it's part of being in this business. You just
13 expect that there are, you know, possibly some hidden
14 cost in there, because this number came down considerably
15 verses what we talked about previously where it was
16 almost \$180,000. So obviously when you compare those two
17 numbers, this one looks a lot better so...

18 Q. Were --

19 A. But I'm also -- let me clarify. I'm not a
20 masonry. I'm not in masonry, so I don't know how to, you
21 know, estimate masonry or what the real cost of masonry
22 is, so, really, I'm not an expert on that.

23 Q. I understand. And I'm just trying to get a
24 sense of how the negotiations between SYS and Precision
25 Walls went over this proposed change deductive change

1 order --

2 A. Yes.

3 Q. -- and what were the grounds for the
4 negotiations. Do you have any knowledge of that?

5 A. Other than the fact that we were, you know,
6 striving to protect our interest, you know, as far as
7 legally or whatever. I mean we are just, you know, as --
8 you know at some point, it was -- and I don't remember
9 the dates, but, you know, Gary was involved more talking
10 with DJ and Jeff Gillstrap (ph) with SYS as to come to
11 some sort of settlement with SYS.

12 MR. OUZTS: I'm not going to make that an
13 entire thing. I'm just going to make the letter
14 transmittal and the changer order the exhibit.

15 MR. MCDONALD: All right.

16 MR. OUZTS: It's number 15?

17 COURT REPORTER: Yes.

18 (Whereupon Exhibit No. 15 was marked for
19 identification.)

20 Q. I'm going to show you, Mr. Howell, Exhibit 15
21 and ask you what that document is.

22 A. This is the final executed change order that
23 I signed.

24 Q. All right. And that is your signature on the
25 bottom accepted by?

1 A. Yes, sir, it is.

2 Q. All right.

3 A. Yes, sir.

4 Q. And according to -- this transmittal letter
5 is dated November the 15th of 2011, correct?

6 A. Yes, that's correct.

7 Q. Is that around the time that you signed this
8 change order?

9 A. Yes, sir, it is.

10 MR. OUZTS: 16?

11 COURT REPORTER: Yes.

12 (Whereupon Exhibit No. 16 was marked for
13 identification.)

14 Q. All right. Mr. Howell, I want to show you a
15 document that I've marked as Exhibit 16, and it is not a
16 Precision Walls' document. It's a -- I'll represent to
17 you that it is an entry in the claim notes of Liberty
18 Mutual Insurance Company in which Jonathan Williams is
19 recording a conversation that he had with you on October
20 the 6th, 2010. And what I would like for you to do is
21 read what Jonathan Williams wrote --

22 A. Okay.

23 Q. -- about that conversation and tell me
24 whether or not it is accurate.

25 A. Yes.

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1 Q. It is?

2 A. It is correct, yes.

3 Q. Who -- who at Liberty Mutual Insurance
4 Company did you most often deal with, with regard to this
5 claim?

6 A. JJ Williams.

7 Q. And that's Jonathan Williams?

8 A. Yes.

9 Q. Okay.

10 A. It started out with Shareem Ramzenelli (ph)

11 --

12 Q. Right.

13 A. -- but it was -- I honestly -- I don't
14 remember how long. She wasn't involved for too long, and
15 I think Jonathan took over shortly thereafter.

16 Q. Aside from the fact that Liberty Mutual
17 ultimately decided that there was no coverage for this
18 claim, do you have any complaints about how either JJ
19 Williams or Shareem Ramzenelli handled the claim on
20 behalf of Liberty Mutual or the investigation of the
21 claim I should say?

22 A. Jonathan did not seem to have a basic
23 knowledge of construction which was a hindrance during
24 the conversation of explaining. And I don't remember the
25 exact amount of time, but there did seem to be quite an

1 extended period of time where there was lack of
2 communication between Jonathan and myself. I can not
3 speak for people in our home office or whatever and maybe
4 he was in contact with them. But as far as, you know,
5 the way they handseled themselves on the phone or if they
6 were cordial or whatever, they were fine.

7 Q. Were they responsive to you when you had
8 questions of the status of the claim?

9 A. Yes.

10 Q. Did you understand that -- that Liberty
11 Mutual had not accepted coverage of this claim initially
12 and were handling it under what is what we refer to as a
13 "reservation of rights"?

14 A. Was I aware of that?

15 Q. Yes.

16 A. No, sir, I was not.

17 Q. Were you aware that Liberty Mutual was
18 attempting to get Berry Plastics to take responsibility
19 for this claim?

20 A. Yes. At some point somebody -- and it may
21 have been Jerry. It may have been Gary. I don't
22 remember. Somebody indicated that -- and basically what
23 I remember is that Liberty Mutual was attempting to
24 contact Berry Plastics and that's basically the gist of
25 my knowledge.

1 Q. In -- other than supplying facts related to
2 the claim as part of the investigation, what was your
3 role from the perspective of Precision Walls in dealing
4 with Liberty Mutual?

5 A. That was it. I was just providing
6 information to them.

7 Q. Who in the home office was involved in the
8 claim on behalf of Precision Walls?

9 A. Well, to my knowledge it was Gary Roth and
10 Jerry Golt.

11 Q. Okay. And you don't have any knowledge one
12 way or another to what extent or when JJ Williams or
13 other claims handlers at Liberty Mutual might have been
14 in communications with Mr. Golt or Mr. Roth?

15 A. No, sir, I do not.

16 Q. Do you recall ever telling anyone that the
17 brick pavers or the break veneer was beginning to fall
18 off as a result of the loss of adhesion of the insulation
19 tape?

20 A. No, sir. I've never told anybody that.

21 Q. Do you know whether or not anybody from the
22 general contractor ever told anyone that?

23 A. I would find that very hard to believe.

24 Q. That didn't happen?

25 A. No. There was some confusion on JJ Williams

1 part. This lands back to my statement about his
2 knowledge of construction. Somehow he had the perception
3 that the tape had something to do with keeping the brick
4 on the building, which is totally false. It's two
5 separate things, but no.

6 Q. And was that the reason for his call to you
7 on October the 6th to clarify that?

8 A. I don't know. It very possibly could have
9 been. I just don't remember.

10 Q. Did you ever receive any of the letters that
11 Liberty Mutual wrote to Precision Walls regarding their
12 coverage position and their defense position on this
13 claim?

14 A. No, sir, not to my knowledge. I -- I don't
15 remember receiving anything from them.

16 Q. Just based on the way Precision Walls is
17 organized and the division and responsibility, would you
18 expect those letters would have gone to either Mr. Golt
19 or Mr. Roth?

20 A. I would have, yes.

21 Q. I think we already put this in the record,
22 but let me -- this is along the same lines that we just
23 discussed about your communications with JJ Williams. I
24 want you to read -- this is Deposition Exhibit 3, and
25 it's a series of e-mails. I want you to read the ones

1 dated -- the two dated October the 25th between you and
2 JJ Williams and...

3 A. Okay.

4 Q. Is that correct, that he's asking you if any
5 of the brick fell off or was it fully intact, and you say
6 fully intact, correct?

7 A. That's correct.

8 Q. And that's correct?

9 A. Yes. That's a correct statement.

10 Q. Well, let me make sure the record is clear.
11 That's what the e-mail says and that's what actually
12 happened in the field to the best of your recollection?

13 A. That's correct. Yes, sir.

14 Q. Has Precision Walls -- well, you may not be
15 the person to direct this question to, but I will ask you
16 any way.

17 Has Precision Walls taken any action against
18 Berry Plastics to recover the loss caused by the loss of
19 adhesion of their insulation tape?

20 A. I don't know. I'm not the person to ask.

21 MR. OUZTS: Okay. Those are all the
22 questions I have for you Mr. Howell. I appreciate
23 your time.

24 THE WITNESS: Yes, sir.

25 MR. OUZTS: Thank you very much.

1 THE WITNESS: Thank you.

2 MR. MCDONALD: I don't have any questions.

3 (Whereupon the deposition was concluded.)
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CERTIFICATE OF REPORTER

I, Courtney Young, Notary Public for the
State of South Carolina at Large, do hereby certify:

That the forgoing deposition was taken
before me on the date and at the time and location stated
on page 1 of this transcript; that the deponent was duly
sworn to testify to the truth, the whole truth and
nothing but the truth; that the testimony of the deponent
and all objections made at the time of the examination
were recorded stenographically by me and were thereafter
transcribed; that the foregoing deposition as typed is a
true, accurate and complete record of the testimony of
the deponent and all objections made at the time of the
examination to the best of my ability.

I further certify that I am neither
related to nor counsel for any party to the cause pending
or interested in the events thereof. Witness my hand, I
have hereunto affixed my official seal on this 18th day
of December 2011 at Columbia, Richland County, South
Carolina.

Courtney Young,
Notary Public
State of South Carolina at Large
My Commission Expires:
July 13, 2021

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

PRECISION WALLS, INC.,
PLAINTIFF,

vs.

LIBERTY MUTUAL FIRE INSURANCE
COMPANY,
DEFENDANT.

COURT OF COMMON PLEAS
2011-CP-23-02028

TRANSCRIPT OF RECORD

ORIGINAL

February 6, 2013
Greenville, South Carolina

B E F O R E:

THE HONORABLE LETITIA H. VERDIN, JUDGE.

A P P E A R A N C E S:

CHARLES H. MCDONALD, ESQ.
Attorney for the Plaintiff

STEVEN W. OUZTS, ESQ.
Attorney for the Defendant

HOLLIE M. JENKINS
Circuit Court Reporter

I N D E X

(There were no witnesses called.)

E X H I B I T S

(There were no exhibits introduced.)

P R O C E E D I N G S

1
2 THE COURT: The next case is Precision Walls v.
3 Liberty Mutual.

4 Now, I have this set today as a non-jury trial. But
5 I believe I got some correspondence that you all wanted me
6 to decide the case relying on the previous submissions.

7 I believe there's a transcript and some things like
8 that; is that correct?

9 MR. OUZTS: Yes, Your Honor.

10 MR. MCDONALD: Yes.

11 MR. OUZTS: There were some previous motions for
12 summary judgment -- cross motions for summary judgment,
13 which were denied by Judge Stilwell. Chuck and I agreed
14 that the case should be submitted on the same record on
15 the same facts as those summary judgment motions. And,
16 also, relying in large part on the same briefs that were
17 submitted in connection with the summary judgment.

18 The only exception being there were a couple of new
19 cases, the Wallaby case and a Harleysville case that were
20 decided by the Court of Appeals and the South Carolina
21 Supreme Court recently, which we addressed in supplemental
22 memoranda that we just recently submitted.

23 THE COURT: All right. Very well.

24 MR. OUZTS: So the case that Your Honor -- is before
25 Your Honor on a motion -- I guess, technically, on a

1 motion -- my motion for involuntary dismissal under 41(b),
2 but, you know -- and under Rule 52. So we're submitting
3 the case to Your Honor on those -- on an agreement, a
4 factual record for a decision under 52.

5 As far as how to proceed, I'm not sure what the best
6 order is going to be. My suggestion would be for the
7 Plaintiff to go first. And then I'll respond to his
8 argument, if that's acceptable.

9 MR. MCDONALD: That's fine, Your Honor.

10 THE COURT: Do you think that sounds logical?

11 MR. MCDONALD: That's fine. I just -- in my mind,
12 this is sort of a redo from the summary judgment,
13 Mr. Ouzts went first. But I'm happy to go first.

14 THE COURT: All right.

15 MR. OUZTS: And that will be fine.

16 THE COURT: And I noticed that it was set,
17 originally, for an hour when it was set for a non-jury
18 trial. We're a little more constrained with our time
19 right now. And I apologize.

20 Do you think we'll be able to cut it back some from
21 that?

22 MR. MCDONALD: I, certainly, believe so. And you're
23 the Judge.

24 THE COURT: Okay. I don't like to cut you off, but
25 I --

1 MR. MCDONALD: I don't -- Your Honor, it's a lot to
2 digest. I was told that you, perhaps, had the opportunity
3 to look at some of the submissions beforehand. So I think
4 that will streamline it. And I won't go through the
5 facts, unless you --

6 THE COURT: I don't believe so. I'd just love for
7 you to hit the high points for me.

8 MR. MCDONALD: I'll be happy to proceed when you're
9 ready.

10 THE COURT: Okay. Yes, sir.

11 MR. MCDONALD: May it please the Court.

12 Chuck McDonald for Precision Walls, Incorporated,
13 Your Honor. And we're before the Court on an insurance
14 coverage case where the issue is, is it a covered loss
15 when you have to tear down -- if you can imagine, Your
16 Honor, this -- if you -- there's a brick wall that was put
17 over this. If you have to tear that brick wall down to
18 get at the underlying insulation board and tape joints to
19 fix it, is that a covered loss? And that is the question
20 for the Court to decide.

21 Your Honor -- and I submit to the Court when you --
22 insurance coverage can be made complex. It can be made
23 confusing. But I submit, it really doesn't have to be.
24 And if you will just apply the facts to the plain policy
25 language, you'll find there's coverage here. If you get

1 down in the weeds and start figuring out what does this
2 case say and this case say, then you can get on a right
3 confusing path.

4 THE COURT: Okay.

5 MR. MCDONALD: I want to start out, Your Honor, just
6 because it was on my mind how I had the order of my
7 arguments set up just to point out a few things that
8 Liberty Mutual has contended and will contend that we take
9 issue with. And that is, this is not a case about purely
10 economic loss. It's not a case about diminution in value.
11 It's a case about property damage.

12 So any argument about diminution in value or economic
13 loss is misguided. Because that's not what this case is
14 about. It's about property damage. It's not a case about
15 negligent or faulty workmanship, although we do concede it
16 is defective.

17 What happened was, in my picture, my client put up
18 this board and taped the joints. And after they put the
19 brick up around most of the building, they noticed in some
20 of the uncovered parts the tape was already coming off.
21 And, regrettably, to fix it where the brick had already
22 gone up, there was no way to get to it, other than to tear
23 the brick off, fix the tape, put the brick wall back on.

24 So the tape was defective. We think we put it up
25 fine. But the tape was our responsibility. And it came

1 loose and we had to fix it.

2 Your Honor, the Courts have struggled with insurance
3 coverage cases. There's been LJ1, LJ2, Auto Owners I,
4 Auto Owners II, Crossman I, Crossman II. But I would
5 submit to the Court that where we are now is as clear as
6 we've ever been after Crossman.

7 And I want to read to the Court just a brief quote
8 from Crossman that I think is instructive and will guide
9 us here. And that is
10 Justice -- is it Toal? I can't remember if it's --
11 Justice Kittredge wrote this opinion, yes, a Greenville
12 guy. In sum, we clarify that negligent or defective
13 construction resulting in damage to otherwise
14 non-defective components may constitute property damage.
15 But the defective construction would not. That's exactly
16 what we have here.

17 We have defective construction in the form of the
18 tape coming loose. And as a result of having to fix that,
19 they had to tear down an otherwise non-defective
20 component, the brick wall. So I think that Crossman,
21 certainly, is instructive on the fact of whether we have
22 property damage or not in this case.

23 Your Honor, there are three fundamental concepts that
24 you have to keep in mind when you're going to do this
25 analysis. And I think these are very important. One is

1 the insuring agreement -- where did I put my board? It
2 fell on me here -- which we have to prove you construe
3 very broadly in favor of coverage.

4 Now, unfortunately, insurance carriers over the years
5 have done a good job of getting courts a little bit turned
6 around and to construe this narrowly. And they've taken
7 concepts that are in policy exclusions and morphed them
8 into things like what is an occurrence, or what is
9 property damage? And that's why we've wrestled with these
10 things in LJ, and Newman, and Crossman. But we don't have
11 to do that, because the exclusions are separate.

12 And this is a -- I would submit to the Court a fairly
13 low threshold that the insured has to jump over and
14 establish, okay, we've got coverage. And, now, we look at
15 the exclusions to see, do they take coverage away?

16 THE COURT: All right.

17 MR. MCDONALD: So an important concept that the CGL
18 policy grants broad liability coverage, which is narrowed
19 by exclusions. We have to show coverage under the
20 insurance -- insuring agreement. They would have to prove
21 exclusions, which are construed narrowly.

22 And the reason is these insurance contracts are all
23 the same. You don't go and say I don't like this
24 provision, Liberty Mutual, or I don't like this provision,
25 Harleysville. You don't get that choice. You get the

1 standard policy that everybody gets. So that's why the
2 policy is what it is that -- this is broadly construed in
3 favor of coverage, exclusions narrowly construed against
4 the insurer.

5 Your Honor -- and I would submit, if you listen
6 carefully to Liberty Mutual's argument, they're going to
7 want to reverse those rules. They're going to want to
8 construe this narrowly against coverage and have the
9 exclusions construed broadly, which, also, would defeat
10 coverage.

11 Looking just at the insuring agreement, Your Honor,
12 what do we have to prove? Several things. We have to
13 prove that we are obligated to pay damages because of --
14 in this case, property damage. And we have to show that
15 the property damage was caused by an occurrence.

16 And, Your Honor, I would submit that there's really
17 no dispute in this case that we're legally obligated to
18 pay the damages. We had to pay the general contractor,
19 SYS Construction. In our subcontract, they had the right
20 to withhold the money. They did withhold \$97,500 from us,
21 which is our loss. So I don't believe there's any dispute
22 that there -- we were legally obligated to pay damages.

23 Now, the real issue is, was there property damage?
24 Was there an occurrence? And did the occurrence -- I
25 submit the real issue here is, did the occurrence cause

1 the property damage?

2 But the first thing we have to show under this
3 analysis is, was there property damage? And the
4 definition, Your Honor, is -- this helps me maybe more
5 than the Court. I don't know if you can see it --

6 THE COURT: I can.

7 MR. MCDONALD: -- but the policy is physical injury
8 to tangible property, including all resulting loss of use
9 of that property.

10 And, Your Honor, it just seems to me nothing could be
11 more obvious than tearing down a brick wall is physical
12 injury to tangible property. And I would submit that the
13 Crossman case supports that when it says that defective
14 construction resulting in damage to otherwise
15 non-defective components may constitute property damage.

16 The tape is defective construction. To remediate the
17 tape, we had to tear down the brick wall, which was the
18 third-party property. It wasn't our work. It wasn't our
19 property.

20 Now, the Wallaby case, which we supplemented --
21 submitted supplemental briefs on, Your Honor, let me talk
22 about that for a minute. I do want to point out to the
23 Court that I don't think we've heard the last of that,
24 that there is a petition for rehearing on that. And my
25 personal belief is it conflicts with other appellate court

1 opinions of what constitutes property damage. And that we
2 probably will not -- unfortunately, there may be a Wallaby
3 II. I don't know. That's just my personal belief.

4 But even under the Wallaby analysis, we have property
5 damage here. Because, in that case, what they held was
6 that the remediation -- the contractor tore down his own
7 work as part of the remediation efforts. And they said,
8 well, that's not physical injury to tangible property. I
9 have a hard time understanding how that's not.

10 But honoring the Wallaby court, assuming that's the
11 law, what we have here is very different. We have -- when
12 the brick wall was put over this and it was torn down --
13 there was nothing wrong with the brick wall. So it was
14 the property of another. It wasn't our work. And it was
15 torn down so we could do the remediation work. It wasn't
16 part of the remediation work. There was nothing wrong
17 with it.

18 THE COURT: Okay. I see.

19 MR. MCDONALD: It was a perfectly fine brick wall.

20 So that's the difference, I would submit. And that
21 was the key in Wallaby. They said that this guy is
22 tearing down his own wall because he caused a problem.
23 Well, here, the wall wasn't the problem. It was behind
24 the wall. And they -- somebody else tore down somebody
25 else's property so we could get to our work. So that's

1 why, under Wallaby, we believe that we're there.

2 So -- and I know I put in my supplemental brief we
3 would argue Part B, but I just can't -- Your Honor, I
4 can't think of an argument to make that Part B would apply
5 that this is not physical injury to tangible property. I
6 just believe that it is. And I can't -- I couldn't come
7 up with a way to argue any other way.

8 So I think we are under Subsection A of the policy
9 definition of property damage, physical injury to tangible
10 property, as I said, tearing down a brick wall. I,
11 certainly, can't -- using common sense and construing the
12 policy broadly in favor of coverage, how is it not
13 property damage?

14 The next analysis, Your Honor, is, was there an
15 occurrence? An occurrence is defined, under the policy,
16 as an accident, including continuous or repeated exposure
17 to the same general home for conditions. What we have
18 here is an accident, the tape coming loose. It meets the
19 very definition, and we put it in our brief, of an
20 unexpected event. I mean, you know, that's exactly what
21 we have here is an accident.

22 And after Crossman, Your Honor, the threshold for an
23 occurrence is so low, you trip over it. I mean, the
24 Crossman case said, this is -- we don't know what it
25 means, essentially, and, insurance companies, you

1 haven't -- you want us to construe it narrowly against
2 coverage, but we don't know what it means. It's
3 ambiguous. And we're going to find it -- we're going to
4 construe it broadly.

5 So I would submit, clearly, we have an accident. But
6 under the current regime of analyzing what is an
7 occurrence after Crossman, you really -- it's hard when
8 you don't have one, and we, certainly, do here.

9 So the issue, Your Honor, I submit to you is not is
10 there property damage? Yes, there is physical injury to
11 tangible property for tearing down a brick wall. It's
12 not, is there an occurrence? Yes, there is. There's an
13 accident. But the last part of the policy of the insuring
14 agreement is, did the occurrence -- was the property
15 damage caused by an occurrence?

16 So, to me, that's a real honest issue here, and maybe
17 where I differ from my colleague. But I can understand
18 somebody saying, well, how did the tape come away? It
19 didn't knock the brick wall down. No, it didn't. When
20 the tape came loose, it did not knock the brick wall down.

21 But in the context of construing the insuring
22 agreement, as I pointed out in the brief, the causation
23 analysis is a but-for analysis. It's a cause and fact
24 analysis. So but for the tape coming loose, would the
25 brick wall have come down? No. If this didn't come loose

1 behind the brick wall, the brick wall stays up. But
2 because the tape came loose and had to be repaired, you
3 had to tear the brick wall down. So but for the tape
4 coming loose, you don't tear the brick wall down.

5 THE COURT: All right.

6 MR. MCDONALD: So I submit, certainly, under the --
7 again, we're in the insuring agreement where we don't look
8 to defeat coverage, we look to give coverage. And so in
9 that -- under that rubric, it is causation. And so we
10 have property damage caused by an occurrence.

11 THE COURT: All right.

12 MR. MCDONALD: So, hopefully, that was not too
13 lengthy.

14 Now, let me address the exclusions, Your Honor,
15 since --

16 THE COURT: All right.

17 MR. MCDONALD: -- and this won't take but a second.

18 THE COURT: Okay.

19 MR. MCDONALD: So, now, we've gone through the
20 insuring agreement. And I'll submit to the Court, we've
21 proven, on the record that, yes, we have coverage. So
22 then it turns to, okay, are there any exclusions that take
23 away coverage? And the exclusions at issue here -- and I
24 apologize if I lapse in a little bit of a jargon that's
25 familiar when you do coverage work. But what I'm used to

1 calling the J5 or J6 exclusions found in the policy or
2 the -- that particular part exclusions.

3 Because the reason I interpret it that way or call it
4 that, Your Honor, is that is the lynch pin for those two
5 exclusions. In order for them to apply, we would have to
6 have been doing work on the damaged property. And,
7 clearly, we weren't, as this picture shows. A picture is
8 worth a thousand words in this case. In order for J5 and
9 J6 to apply, we would have had to have been performing
10 work on the brick wall. Well, our work is done and the
11 brick wall comes out.

12 So, obviously, in this case, we don't know what came
13 first, the chicken or the egg. But we do know what came
14 first here, it was our work. And we didn't do anything on
15 the brick wall. So that's as simple as that, Your Honor.
16 We didn't do any work on the brick wall. Therefore,
17 neither J5 or J6 apply.

18 And the last -- the third exclusion that Liberty
19 Mutual relies on is called the impaired property
20 exclusion. It's found in Subsection M of the policy. But
21 we don't have impaired property. And that's the key. You
22 have to ask, do -- is the policy definition of impaired
23 property met? That's the first thing you have to ask in
24 that exclusion. And, no, it's not. Because the
25 definition would require that once we fixed our tape, the

1 walls would be fixed. That's what impaired property
2 means.

3 If you correct your work and then it, therefore,
4 restores the property damage, it's impaired property. But
5 because we -- you can't -- once you tear the brick wall
6 down, it's torn down. Putting this tape back can't
7 restore it. So it can't be impaired property under the
8 policy definition.

9 It would have to be -- you know, like, for instance,
10 impaired property, if something was wrong with that light
11 fixture and I had to take the light bulb out, and I fixed
12 it and I put the light bulb back in, that could be
13 impaired property. There's no damage to the light bulbs.
14 But, in this case, you can't -- by fixing the tape joints,
15 you can't bring back the torn down brick wall. It had to
16 be built again.

17 THE COURT: All right.

18 MR. MCDONALD: So -- and nothing in Wallaby changes
19 any of the analysis on the exclusions, Your Honor. So it
20 really is that simple. Maybe it didn't seem that simple.
21 But it is a straightforward analysis of facts to policy
22 terms. And when you do that, you'll find there's
23 coverage.

24 Thank you, Your Honor.

25 THE COURT: Thank you.

1 I appreciate it.

2 I gave him about 15 minutes. And if you feel like
3 you can do it in that time, that would be great.

4 MR. OUZTS: Yes, ma'am. I'll do my best.

5 First of all, Your Honor, let me just incorporate my
6 reference, all the briefs that we have previously
7 submitted. Those contain a full explanation of our
8 arguments.

9 THE COURT: All right. Yes, sir.

10 MR. OUZTS: And I'll hit the high spots.

11 THE COURT: Okay.

12 MR. OUZTS: First of all, I'd like to start, also,
13 with a quote from the Crossman case, which is the most
14 recent Supreme Court case on the analysis, I think. And
15 they're talking about the definition of property damage.
16 And they say, We emphasize the difference between a claim
17 for the cost of repairing or removing defective work,
18 which is not a claim for property damage, and a claim for
19 the cost of repairing damage caused by the defective work,
20 which is a claim for property damage.

21 And CD Walters, an earlier case that's, also, cited
22 in my brief, describes the purpose of a commercial general
23 liability policy this way -- and I'll just read a few
24 lines from that opinion. It's talking about the
25 difference between business risks, which are risks that

1 should be born by, in this case, the contractor and
2 insurable risks that cause accidental injury to a person
3 or the property of another.

4 THE COURT: Right.

5 MR. OUZTS: And it says this, The insured contractor
6 can take pains to control the goods and services supplied.
7 At the same time, he undertakes the risk that he may fail
8 in this endeavor and thereby incur contractual liability,
9 whether expressed or implied. The consequence of not
10 performing well is part of every business venture. The
11 replacement or repair of faulty goods and works is a
12 business expense to be born by the contractor in order to
13 satisfy customers.

14 And then later on quoting from a -- the author of the
15 treatise, it says, The insured, as a source of goods or
16 service, may be liable as a matter of contract law to make
17 good on product or work which is defective or otherwise
18 unsuitable because it is lacking in some capacity. This
19 may even extend to an obligation to completely replace or
20 rebuild the deficient product or work. The liability --
21 this liability, however, is not what the coverage is in
22 question or designed to insure against. Your Honor,
23 that's what we have in this case.

24 Precision Walls selected a tape to put on the seams
25 of this insulation board. And the tape proved to be

1 defective. The contract specified that the insulation
2 boards be sealed with a sealed tape. And so when the
3 general contractor noticed that the sealed tape was losing
4 adhesion and, therefore, not performing its function, it
5 determined that the work performed by Precision Walls did
6 not meet the contract specification.

7 And so you'll see in the file where the general
8 contractor wrote Precision Walls a letter to that effect,
9 This is not in accord with contract specifications and,
10 therefore, the work is going to have to be redone. And so
11 as counsel pointed out, the only way to perform the rework
12 was to take down portions of the brick veneer that had
13 already been put up in order to gain access to the wall
14 behind.

15 It's an admitted fact that the -- that Precisions
16 Walls -- that -- well, let me put it another way. It's
17 admitted by Precision Walls that the cost of removing and
18 replacing the seal tape on the insulation board is not a
19 covered loss. That's on Page 3 of their memorandum.

20 It's, also, admitted and there's deposition testimony
21 of Mr. Howle [phonetic] to this effect that there was no
22 problem with the brick veneer. There was no damage to the
23 brick veneer as of the time it was put up. And the only
24 reason that it was taken down was in order to get access
25 to an insulation board and tape underneath.

1 So this whole idea of the brick veneer being property
2 damage is really just an effort to substitute that expense
3 for the expense of repairing this wall. It's a contract
4 liability. The expense was incurred as a deductive change
5 order to Precision Walls contract. And it's an expense
6 that, under South Carolina case law from CD Walters all
7 the way up to Crossman and Wallaby, has been born by the
8 contractor, and not the insurance company.

9 So let's -- with that background, let me just quickly
10 run through the cases that are at issue here. First of
11 all, is there property damage? As my colleague pointed
12 out, there are two definitions -- two parts of the
13 definition of property damage. Subsection A says property
14 damage is physical injury to tangible property.
15 Subsection B is loss of use of property that has not been
16 physically injured.

17 As I understand my -- Precision Walls counsel, he's
18 withdrawn his argument that this is a loss of use under
19 Subsection B. So what we're talking about is physical
20 injury to tangible property.

21 The most recent case, the Wallaby case, is, clearly,
22 on point. It says that it's -- the costs of partial -- a
23 partial tear down of a structure that in that instance
24 didn't meet zoning ordinances is not physical injury to
25 tangible property because it's not an injury. It's not a

1 violation of a third parties right. Because it was the
2 third party who instructed the contractor to do it. It
3 was remedial and, therefore, not an injury.

4 But Wallaby doesn't stand alone in isolation on that
5 point. It's just one in a long line of South Carolina
6 cases that have held that the cost of repairing defective
7 work is not a covered risk under a commercial general
8 liability policy.

9 I've cited a number of cases from other jurisdictions
10 in my brief that have held similarly. The most direct
11 statement of it is probably the New Hampshire v. Vieira
12 case in which the Court just straight out said that the
13 method of repair doesn't determine whether or not there's
14 coverage under a CGL policy.

15 In that case, it was a situation where the contractor
16 had left out some drywall in the attic. And in order to
17 put the drywall in, he had to drill holes in the roof,
18 which were not otherwise -- which was otherwise undamaged.
19 And the Court said, you know, that's not property damage.
20 That's a voluntary decision, a remedial effort taken by
21 the contractor to get at the underlying defect, which was
22 the omission of the drywall.

23 Here, it's the omission or the use of a defective
24 tape. And it's clear that as of the time -- well, like I
25 said, Precision Walls admits that the cost of repairing

1 and removing the tape is not a covered loss. Prior to
2 repairs, there's nothing wrong with the brick veneer. So
3 how could that be a covered loss?

4 So what Precision Walls is arguing then is, well, but
5 once we implemented the repairs, we had to take down the
6 brick wall and, therefore, that's what makes it covered.
7 The cases don't support that. Precision Walls hasn't
8 cited a case that supports that. Your Honor, it's just
9 not property damage within the definition of the policy.

10 THE COURT: All right.

11 MR. OUZTS: The next issue is whether or not there's
12 an occurrence. And I won't dwell on this. The LJ case is
13 the case cited in my brief. And it says the cost of
14 repairing faulty work is not an occurrence. Why? Because
15 the consequences of doing faulty construction is that it
16 will have to be repaired. And that's not unexpected.
17 That's not accidental. It's an anticipated consequence of
18 faulty or defective work, in this instance, using a tape
19 that wasn't sufficient.

20 Your Honor, in addition to the -- those two coverages
21 are within the insurance agreement -- insuring agreement.
22 We, also, rely on two policy exclusions, J6, which
23 excludes coverage for property damage to that particular
24 part of any property that must be restored, repaired, or
25 replaced because your work was incorrectly performed on

1 it.

2 And, again, Precision Walls is trying to -- they're
3 trying to pull this wall apart. What we're talking about
4 is a wall. They did the insulation in the wall and then
5 somebody put brick over it. But they want to pull -- you
6 know, pull the wall apart and say, well, you know, we
7 didn't work on the brick. We only worked on the
8 insulation. Well, what they worked on was the wall. And
9 it was the wall that had to be restored or repaired.

10 And the Century Indemnity case that we cite in our
11 brief makes that very point. The general -- the
12 contractor in that case was, also, trying to separate the
13 elements of the wall between the cladding and the
14 sheathing underneath. The Court said, no, you can't avoid
15 the exclusion that way. So they held that the exclusion
16 applied.

17 There's, also -- that exclusion was, also, at issue
18 in the Wallaby case. And the Court explicitly said the
19 exclusion applies to both defective and non-defective
20 work.

21 Finally, Your Honor, the damage to impaired property
22 exclusion excludes coverage for property damage to
23 impaired property, or property that has not been
24 physically injured arising out of a defect, deficiency,
25 inadequacy, or dangerous condition in your product, or

1 your work, or a delay or failure by you or anyone acting
2 on your behalf to form a contract or agreement in
3 accordance with its terms. That's exactly what we have
4 here.

5 Precision Walls failed to perform its contract in
6 accordance with its terms. As a result, the general
7 contractor had to repair the wall and restore it to use by
8 replacing the defective seam tape. That exclusion applies
9 as well, Your Honor.

10 So, in short, what Precision Walls is asking the
11 Court to do here by seeking coverage is really -- it would
12 amount to a profound change in the law of South Carolina.
13 Not only would an insurer be put in the position of
14 guaranteeing the quality of the -- of its contractor's
15 work, it would guarantee the materials used by -- the
16 quality of the materials used by it. It would guarantee
17 the quality or suitability of the architects specification
18 of the material. It's very broad and something way beyond
19 what a commercial general liability policy is intended to
20 do.

21 Thank you, Your Honor.

22 THE COURT: I thank you.

23 I thank you both for your excellent arguments, and,
24 from what I've seen in the briefs so far, the excellent
25 briefs.

1 Well, I've got some work to do ahead of me.

2 MR. OUZTS: Sorry, Your Honor.

3 THE COURT: No. That's fine. I'll -- that's what
4 I'm supposed to do. But I will -- but I don't have much
5 under advisement, to tell you the truth. So I'll be able
6 to get to it quickly.

7 So I'll be issuing a decision shortly.

8 MR. OUZTS: Thank you.

9 MR. MCDONALD: Thank you.

10 THE COURT: Thank you all.

11 *****END OF TRANSCRIPT OF RECORD*****
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CERTIFICATE OF REPORTER

STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE)

I, HOLLIE JENKINS, Official Court Reporter for the Thirteenth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete Transcript of Record of the proceedings had and the evidence introduced in the captioned case, relative to appeal, in the Court of Common Pleas for Greenville County, South Carolina, on the 6th day of February, 2013.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

June 25, 2013

Hollie M. Jenkins

Hollie M. Jenkins, Court Reporter

My Commission Expires: 09/24/20

n0128726

From: Howell, Kevin
Sent: Monday, October 25, 2010 2:47:04 PM
To: Williams, Jonathan
Subject: Re: Help

It was fully intact.

— Original Message —
From: Williams, Jonathan <Jonathan.Williams@LibertyMutual.com>
To: Howell, Kevin
Sent: Mon Oct 25 14:45:21 2010
Subject: RE: Help

Kevin,

Did ANY of the brick wall fall because of the loosening tape? Or was the wall fully intact when they decided to pull it down to replace the tape behind it?

Thanks,

JJ

— Original Message —
From: Howell, Kevin [mailto:KHowell@precisionwalls.com]
Sent: Wednesday, October 20, 2010 1:55 PM
To: Williams, Jonathan
Cc: Roth, Gary; Gott, Gerry
Subject: FW: Help

FYI, JJ please see below recommendation from Owens Corning. The tape we submitted was an equal to their Build R Tape. Thanks,

Kevin Howell
Precision Walls Inc.
925 GSP Drive
Greer SC 29651
Office-864-334-2100
Fax-864-334-2101
Mobile-864-444-6852
www.precisionwalls.com

"Partners In Driving your Job"

— Original Message —
From: Taylor, Jimmy
Sent: Friday, February 12, 2010 1:32 PM
To: david.lewsey@owenscorning.com
Cc: Howell, Kevin
Subject: FW: Help

David,

As you can read below, Terri Poland for Owens Corning stated that we could use any house wrap



LM 00082



General Contracting • Commercial • Industrial
20 Brozzini Court - Greenville, SC 29615 - Tel. 864/288-3885

Memorandum

To: All Attendees cc. Jeff Gilstrap, SYS
From: DJ Doherty III
Date: 2-4-10
Re: Tape Inspection at Tri-County Tech

The following members of the construction team for the Tri-County Technical College Occupational Center in Easley, SC, attended a meeting and review of the tape used on the joints of the polystyrene insulation on the exterior walls. The meeting was held at the jobsite at 1:00 PM on February 3rd, 2010.

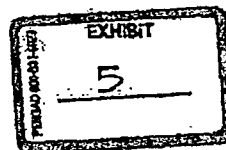
Attendees

- DJ Doherty III, SYS Constructors
- Rob Moore, SYS Constructors
- Stacy Phillips, SYS Constructors
- Chris Stone, Neal Prince Architects
- Luke Miller, Neal Prince Architects
- Kevin Howell, Precision Walls
- Jimmy Taylor, Precision Walls
- Heyward Lambert, Precision Walls
- Paul Blackwell, Pride Masonry

Purpose of the meeting: Over time it was noticed that the tape on the joints of the polystyrene insulation was coming loose from the areas of the building that did not have brick covering the insulation. The team discussed this occurrence, and made the decision to change tape types. All areas that did not have brick covering the insulation were changed to a 4" wide butylenes tape. Concern was raised if the tape behind the brick was coming loose as well. The meetings purpose was to investigate to see if the tape was adhering to the insulation inside the wall or if it is peeling loose.

The following were findings of the meeting:

- Three holes were cut from the inside of the densglass and through the insulation on the exterior of the building. The location of these holes are shown on the attached drawing.



LM 00085

Williams, Jonathan

From: Howell, Kevin [KHowell@precisionwalls.com]
Sent: Tuesday, November 30, 2010 11:03 AM
To: Williams, Jonathan
Subject: FW: Tape on Polyiso Insulation

Kevin Howell
Precision Walls Inc.
925 GSP Drive
Greer SC 29651
Office-864-334-2100
Fax-864-334-2101
Mobile-864-444-6852
www.precisionwalls.com

"Partners in Driving your Job"

From: Dennis John Doherty [mailto:djdoherty@sysconstructors.com]
Sent: Monday, February 01, 2010 1:48 PM
To: Howell, Kevin; chris@neal-prince.com; Matthew Santilli; Taylor, Jimmy
Cc: Rob Moore; Stacy Phillips
Subject: Tape on Polyiso Insulation

We would like to set up a "forensic review" to determine if we have an issue with tape coming off the insulation behind the brick that was installed prior to changing tape manufacturers. We have photo's of the tape in place, but based off of the performance of the tape on other sides of the building, we need to make sure now that we do not have an issue.

We will have a flexible camera that we would like to cut a small hole in the back of the wall and fish through to examine the condition of the tape from the inside.

We would like to meet onsite this Wednesday at 1:00 to conduct this review. Is everyone available to meet on site at this time to review?

We will also need to discuss a solution for the peel and stick at the windows.

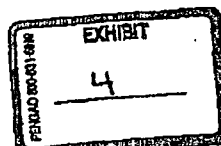
Please reply to let me know if you can be there.

Thnx,

DJ

	"A Quality Construction Experience"
DJ Doherty III, LEED AP Project Manager	SYS Constructors, Inc. 20 Brozzini Ct.

11/30/2010



LM 00155

135

APPX 0138

could please send me that again. thanks

Randy Hug
864-304-3013
rhug@hwsupply.com

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Translations available: <http://www.owenscorning.com/emailfooter.html>

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LM 00084

tape...

Thanks, Jimmy Taylor

-----Original Message-----

From: Hug, Randy [mailto:rhug@LWsupply.com]
Sent: Wednesday, January 20, 2010 1:50 PM
To: Howell, Kevin; Taylor, Jimmy
Subject: FW: Help

Randy Hug
864-304-3013
rhug@lwsupply.com

-----Original Message-----

From: Poland, Terri [mailto:terri.poland@owenscorning.com]
Sent: Wednesday, January 20, 2010 1:35 PM
To: Hug, Randy
Cc: Herring, David H.
Subject: FW: Help

Hi Randy,

We recommend that you use our Build R Tape. However you can use any housewrap tape. The reason being, when you tape the seams of Foamular it performs as a weather resistant barrier. Housewrap tape has the characteristics to meet this performance. If you need any other information please let me know.

Thanks,
Terri Poland
Owens Corning
Sales Representative
419-248-8281 office
419-349-8553 cell
419-325-4281 fax

Terri, can you please handle with Randy. Thanks

-----Original Message-----

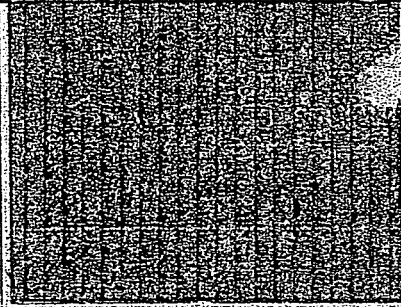
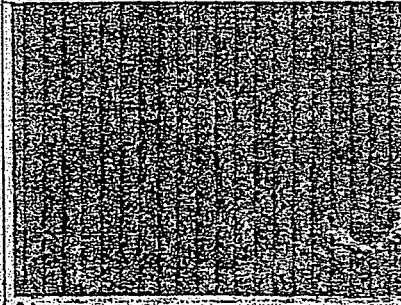
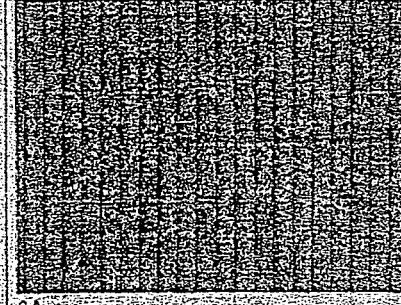
From: Hug, Randy [mailto:rhug@LWsupply.com]
Sent: Tuesday, January 19, 2010 2:14 PM
To: Herring, David H.
Subject: Help

David a while back you sent me an email of what Owens coming suggest to use to tape rigid insulation. Pete with p walls wanted the info, he is no longer there and now they are looking for the info again. If you

LM 00083

February 5, 2010

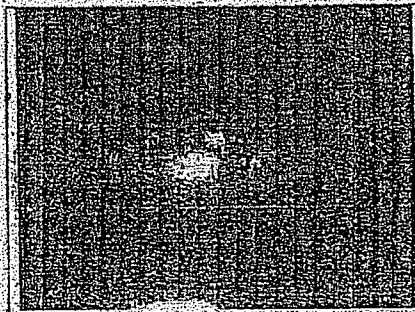
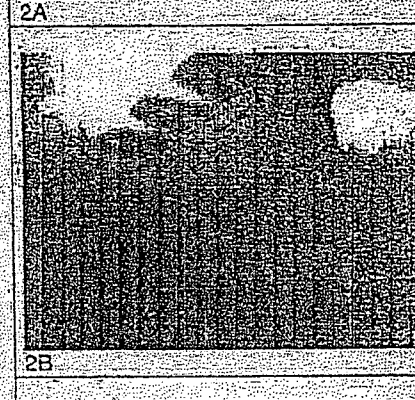
At Hole #1 the following pictures were taken and determinations made:

 1A	The tape appears to be in full adhesion.
 2A	The tape appears to be peeling off in a 4" to 6" section just before it reaches the adjacent brick tie.
 3A	This is the same condition as the photo above.

LM 00086

February 5, 2010

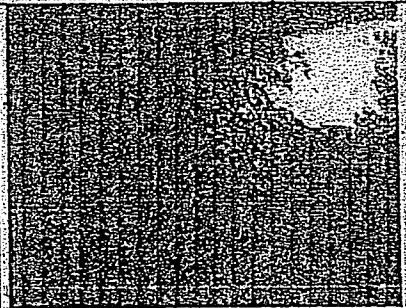
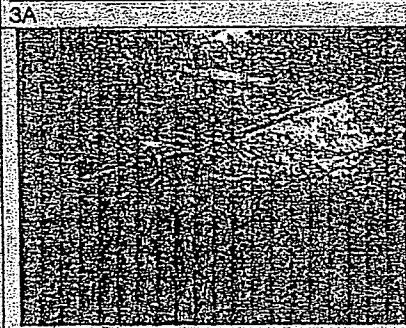
- At Hole #2 the following photos were taken and determinations made:

	The tape appears to be in full adhesion.
	The tape appears to be in full adhesion.

- At Hole #3 the following photos were taken and determinations made:

LM 00087

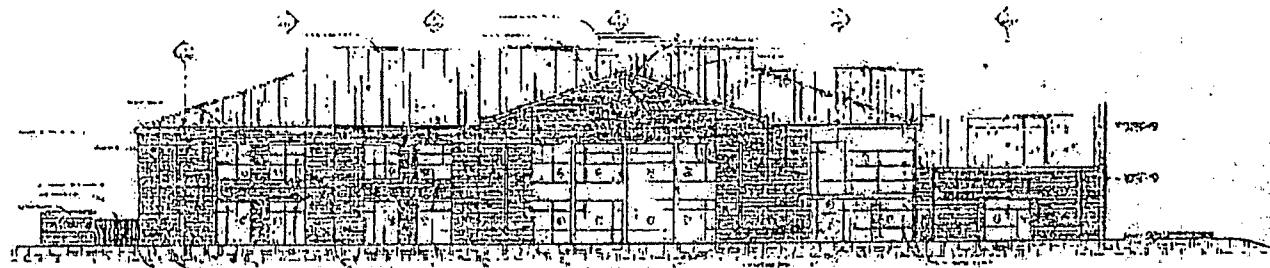
February 5, 2010

	The top half of the tape has lost adhesion to the insulation and pulled free, the bottom portion of the tape has remained adhered to the insulation. The mortar that fell in the wall cavity during brick installation stuck to the sticky side of the tape where it had folded over.
	The top half of the tape has lost adhesion to the insulation and pulled free, the bottom portion of the tape has remained adhered to the insulation. The mortar that fell in the wall cavity during brick installation stuck to the sticky side of the tape where it had folded over.

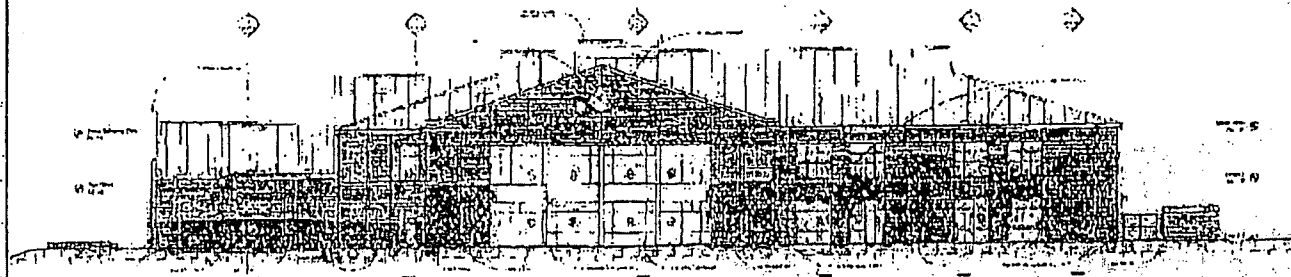
3A

3B

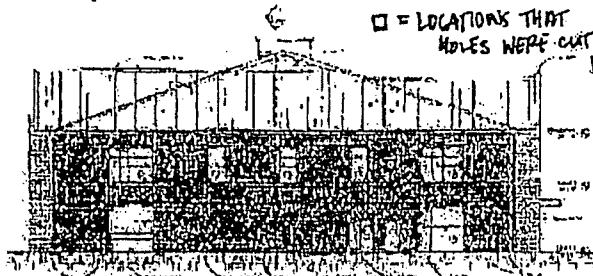
LM 00088



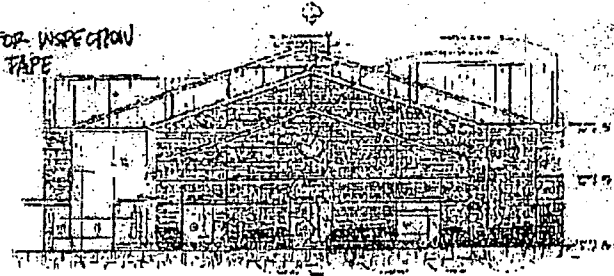
North Elevation



South Elevation



East Elevation



West Elevation

□ = LOCATIONS THAT
HOLES WERE CUT FOR INSPECTION
OF TAPE

■ = AREAS WITH WHITE TAPE BEHIND
BRICK

RECEIVED
A-200

2/4/10

The County Technical College Occupational Center San Diego 92108-0001 Entry: San Carlos
DATE FOR CONTRACTOR
RECEIVED A-200

LM 00089

140

APPX 0144

Williams, Jonathan

From: Howell, Kevin [KHowell@precisionwalls.com]
Sent: Tuesday, November 20, 2012 11:12 AM
To: Williams, Jonathan
Subject: FW: Help

JJ: You will notice that David Lewsey with Owens Corning is copied on this e-mail. He was in attendance at the on site meeting and had said that his company would never agree that the house wrap tape would be acceptable but we never heard anything else from him after the e-mail was produced in which a representative from his own company did verify that the tape would work. By the way he did say at the meeting that if the joints are staggered between the sheathing and the foamular product that the tape is really not needed but refused to put this in writing.
Thanks.

Kevin Howell
Precision Walls Inc.
925 GSP Drive
Greer SC 29651
Office-864-334-2100
Fax-864-334-2101
Mobile-864-444-6852
www.precisionwalls.com

"Partners in Driving your Job"

-----Original Message-----

From: Taylor, Jimmy
Sent: Friday, February 12, 2010 1:32 PM
To: david.lewsey@owenscorning.com
Cc: Howell, Kevin
Subject: FW: Help

David,

As you can read below, Terri Poland for Owens Corning stated that we could use any house wrap tape...

Thanks, Jimmy Taylor

-----Original Message-----

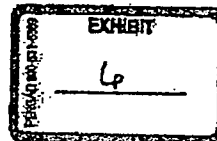
From: Hug, Randy (mailto:rhug@LWsupply.com)
Sent: Wednesday, January 20, 2010 1:53 PM
To: Howell, Kevin; Taylor, Jimmy
Subject: FW: Help

Randy Hug
864-304-3013
rhug@lwsupply.com

-----Original Message-----

From: Poland, Terri (mailto:terri.poland@owenscorning.com)
Sent: Wednesday, January 20, 2010 1:35 PM
To: Hug, Randy
Cc: Herring, David H.
Subject: FW: Help

Hi Randy,



LM 00166

Williams, Jonathan

From: Howell, Kevin [KHowell@precisionwalls.com]
Sent: Tuesday, November 30, 2010 11:08 AM
To: Williams, Jonathan
Subject: FW: Help

Jonathan: We felt this e-mail was of extreme importance since it was coming from Owens Corning and confirmed the use of a house wrap tape.
Thanks...

Kevin Howell
Precision Walls Inc.
925 GSP Drive
Greer SC 29651
Office-864-334-2100
Fax-864-334-2101
Mobile-864-444-6852
www.precisionwalls.com

"Partners in Driving your Job"

-----Original Message-----

From: Taylor, Jimmy
Sent: Friday, February 12, 2010 1:32 PM
To: david.jewsey@owenscorning.com
Cc: Howell, Kevin
Subject: FW: Help

David,

As you can read below, Terri Poland for Owens Corning stated that we could use any house wrap tape...

Thanks, Jimmy Taylor

-----Original Message-----

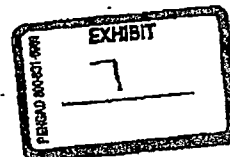
From: Hug, Randy [mailto:rhug@LWsupply.com]
Sent: Wednesday, January 20, 2010 1:53 PM
To: Howell, Kevin; Taylor, Jimmy
Subject: FW: Help

Randy Hug
864-304-3013
rhug@lwsupply.com

-----Original Message-----

From: Poland, Terri [mailto:terri.poland@owenscorning.com]
Sent: Wednesday, January 20, 2010 1:35 PM
To: Hug, Randy
Cc: Herring, David H.
Subject: FW: Help

Hi Randy,
We recommend that you use our Build R Tape. However you can use any housewrap tape. The reason being, when you tape the seams of Foxtular it performs as a weather resistant barrier. Housewrap tape has the characteristics to meet this performance. If you need any other



LM 00163

information please let me know.

Thanks,
Terri Poland
Owens Corning
Sales Representative
419-248-8281 office
419-349-8553 cell
419-325-4281 fax

Terri, can you please handle with Randy. Thanks

-----Original Message-----

From: Hug, Randy [mailto:rhug@LWsupply.com]
Sent: Tuesday, January 19, 2010 2:14 PM
To: Herring, David H.
Subject: Help

David a while back you sent me an email of what Owens coming suggest to use to taperigid insulation. Pete with p walls wanted the info, he is no longer there and now they are looking for the info again. If you could please send me that again. thanks

Randy Hug
864-304-3013
rhug@lwsupply.com

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and destroy or delete all copies of the original message and any attachments. Thank you.

We recommend that you use our Build R Tape. However you can use any housewrap tape. The reason being, when you tape the seams of Foamular it performs as a weather resistant barrier. Housewrap tape has the characteristics to meet this performance. If you need any other information please let me know.

Thanks,
Terri Poland
Owens Corning
Sales Representative
419-248-8281 office
419-349-8553 cell
419-325-4281 fax

Terri, can you please handle with Randy. Thanks

-----Original Message-----

From: Hug, Randy [mailto:rtug@LWsupply.com]
Sent: Tuesday, January 19, 2010 2:14 PM
To: Herring, David H.
Subject: Help

David a while back you sent me an email of what Owens coming suggest to use to tape rigid insulation. Pete with p walls wanted the info, he is no longer there and now they are looking for the info again. If you could please send me that again. thanks

Randy Hug
864-304-3013
rhug@lwsupply.com

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privileged information. If you are not the intended recipient, you are notified that any use, review, dissemination, copying or action taken based on this message or its attachments, if any, is prohibited. If you are not the intended recipient, please contact the sender by reply email and destroy or delete all copies of the original message and any attachments. Thank you.

n0075201

From: Howell, Kevin
Sent: Friday, February 12, 2010 1:40:43 PM
To: Roth, Gary
Subject: FW: Tri-County Tech Tape on Insulation
Attachments: image001.jpg

From: Dennis John Doherty [mailto:djdoherty@sysconstructors.com]
Sent: Monday, February 08, 2010 5:13 PM
To: Howell, Kevin; Taylor, Jimmy
Cc: Rob Moore; Jeff Gilstap
Subject: Tri-County Tech Tape on Insulation

Kevin,

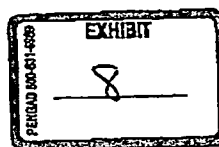
It has been noted that the tape used on the joints of the polystyrene insulation has lost its adhesion and appears to be peeling off of the insulation. Once noticed, this occurrence caused our direction to request an alternate tape that would not peel off of the joints.

There is an area of the building where the brick veneer was installed prior to the occurrence of the tape falling off the building. Last week during our investigative meeting it was determined that the tape appears to be peeling off the insulation behind the brick as well.

It is our opinion that it is the responsibility of Precision Walls to provide a taped and sealed insulation at the exterior wall. Any corrective action required to provide this would be at the expense of Precision Walls. If corrective action is required to change the tapes behind the brick veneer, then all work associated with that change will be at the expense of Precision Walls.

Please let me know if you have any questions.

Thnx,



LM 00197

DJ

DJ Doherty III, LEED AP
Project Manager

SYS Constructors, Inc.
20 Brozzini Ct.
Greenville, SC 29615

ddoherty@sysconstructors.com

tel:
fax:
mobile:

864-288-3885
864-272-3412
864-303-3416

LM 00198

Williams, Jonathan

From: Howell, Kevin [KHowell@precisionwalls.com]
Sent: Tuesday, November 30, 2010 11:04 AM
To: Williams, Jonathan
Subject: FW: Dow Rep

Kevin Howell
Precision Walls Inc.
925 GSP Drive
Greer SC 29651
Office-864-334-2100
Fax-864-334-2101
Mobile-864-444-6852
www.precisionwalls.com

"Partners in Driving your Job"

From: Dennis John Doherty [mailto:djdoherty@sysconstructors.com]
Sent: Wednesday, February 10, 2010 7:27 AM
To: Howell, Kevin
Subject: RE: Dow Rep

Sounds good. Should we also contact the tape manufacturer? Barry's tape.

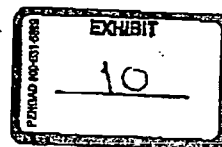
DJ Doherty III, LEED AP
SYS Constructors, Inc.
O-864-288-3885
F-864-234-7620
C-864-303-3416

From: Howell, Kevin [mailto:KHowell@precisionwalls.com]
Sent: Wednesday, February 10, 2010 7:13 AM
To: Dennis John Doherty
Subject: Dow Rep

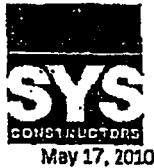
DJ: I have not heard from the rep yet. I do know he was chosen for jury duty yesterday. As soon as I hear from him I will let you know. Thanks.

Kevin

11/30/2010



LM 00158



Mr. Kevin Howell
Precision Walls, Inc.
925 GSP Drive
Greer, S.C. 29651

RE: Tri County Technical College Occupational Center

Dear Mr. Howell,

This letter is to serve as notification of the amount that SYS Constructors, Inc. intends to withhold from Precision Walls payment as requested in the recent pay applications. We are working to understand the full implications of the schedule delay and all rework required to correct the deficiencies. The final costs of work and delays caused by the correction of the deficiency will not be known until the project is complete.

The previous correspondence that was sent on February 12th and February 17th notified you of our intent to withhold payment sufficient to cover the costs that we incur. Our current projection for these costs is approximately \$180,000. It is important to understand that the full effects from this correction cannot be known at this time and this number could potentially increase as the full effects are understood.

A breakdown of how we have currently calculated the amount of the backcharge is seen below:

Masonry	1	lsun	\$ 125,000.00
Project Management (\$2400/wk)	4.33	wks	\$ 10,392.00
Superintendent (\$2200/wk)	4.33	wks	\$ 9,526.00
Early Completion Bonus	1	lsun	\$ 30,000.00
Dumpster Bills	8	pulls	\$ 4,500.00
TOTAL			\$ 179,418.00

Please let me know if you have any questions about the above, and we will proceed to release the payment for your recent pay applications minus both retainage and \$180,000 for the potential cost of the rework required due to the tape deficiency.

Sincerely,

DJ Doherty III, LEED AP

CC: Jeff Gilstrap, SYS Constructors
Rob Moore, SYS Constructors
John Crawford, Karlson Dudley & Crawford, LLC
File 09-083.4.14



SYS Constructors, Inc. • General Contracting • Commercial • Industrial • Institutional
20 Brozzini Court • Greenville, SC 29615 • Tel 864/288-3885 • Fax 864/234-7620 • www.sysconstructors.com

LM 00161

Pride Masonry of Gaffney, Inc.**PO Box 4717
Spartanburg, SC 29305**Phone 864 / 948 1779
Fax 864 / 948 9195

May 25, 2010

SYS Constructors, Inc.
20 Brozzini Court
Greenville, SC 29615

Attn: Mr. D. J. Doherty

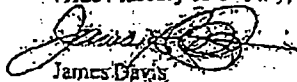
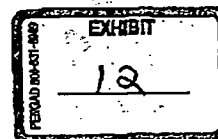
Re: Demo Existing Brick Veneer
Tri-County Technical College Occupational Center
Easley, SC

Dear D.J.,

Our price for the labor to demo the existing brickwork that we had erected on Tri-County is \$ 21,829.00. A breakdown for the labor charges is as follows:

Supervision	\$ 2,137.50
Masons	\$ 4,192.63
Labor	\$ 6,452.25
	\$12,782.38
Payroll Taxes and Insurance 35%	\$ 4,473.83
	\$17,256.21
Equipment 15%	\$ 2,588.43
Overhead and Profit 10%	\$ 1,984.36
Total	\$21,829.00

I have attached a time sheet that list the names, dates, hours and wage rates for the employees doing the demo work. This is a savings over the original \$ 30,000.00 that we had projected. Our revised price for the demo and replacement of the brickwork is \$ 21,829.00. If you have any questions, please call.

Sincerely,
Pride Masonry of Gaffney, Inc.
James Davis

LM00144

Pride Masonry of Gaffney, Inc.

**PO Box 4717
Spartanburg, SC 29305**

Phone 864/948 1779
Fax 864/948 9195

July 26, 2010

SYS Constructors, Inc.
20 Brozzini Court
Greenville, SC 29615

Attn: Mr. Rob Moore

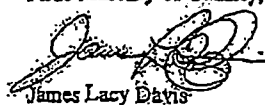
Re: Relaying Brick Veneer
Tri-County Technical College Occupational Center
Easley, SC

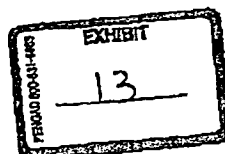
Dear Rob,
Our price for replacing the brickwork that was removed from the East, West, and South
Sides of the building is \$ 63,428.00. A breakdown for the charges is as follows:

Labor	\$ 23,351.00
Payroll Taxes and Insurance 35%	\$ 8,173.00
Material	\$ 19,066.00
Sales Tax 6%	\$ 1,144.00
	\$ 51,734.00
Equipment 10%	\$ 5,173.00
Overhead and Profit 10%	\$ 5,691.00
Total	\$ 62,598.00

I have attached our unit cost takeoff for the work that was done. Please note that there
is no charge for cleaning the brick since that work was not redone. Our original
projection was \$ 64,000.00 for this work. The combined price for the demo (\$21,829.00)
And the replacement of the brickwork (\$65,598.00) is \$ 84,427.00. If you have any
Questions, please call.

Sincerely,
Pride Masonry of Gaffney, Inc.


James Lacy Davis



LM 00142

Takeoff Unit Costs
Tri County TEC Replace Br

Page 1A

Item	Description	Takeoff Qty	Unit Cost		
			Labor	Material	Total
			Unit Cost	Unit Cost	Unit Cost
1100.000	GENERAL CONDITIONS				
1300.010	Personnel: Supervision				
10		3.00 wk	1,200.00	-	1,200.00
1310.020	Travel - All Types				
10	Out of Town Travel	0.00 wk	-	-	-
1740.010	Clean Up				
10		3.00 wk	-	-	-
4000.000	MASONRY				
4050.100	Mortar: All Types				
50	Sand All Mortar	58.37 tons	-	20.00	20.00
60	Std Brk-Mortar Type N-Gray	350.21 bags	-	8.50	8.50
4080.110	Reinforce: Brick Anchors				
10	Brick Anchors	4,160.00 ea	0.10	0.70	0.80
4210.100	Brick: All Types				
10	Standard Size Face Brick	42,872 m	450.992	235.00	685.992
4330.100	Cleaning: Masonry				
10	Clean Brick - General	8,124.502 sf	0.00	-	-
7000.000	THERMAL & MOISTURE PROT				
7220.000	Thru Wall Flashing				
10	5 oz copper fabric w/	850.70 sf	-	1.50	1.50
7225.000	Weep Holes				
20	cell vents	280.01 ea	-	0.25	0.25
7226.000	Mortar Net				
10	Mortar Net	390.68 y	-	1.50	1.50
Estimate Totals					
Labor	23,351		23,351		hrs
Material	19,068		19,068		
	42,417		42,417	42,417	
Taxes & Insurance on Labor	8,173			35.000 %	
Sales Tax	1,144			5.000 %	
Equipment	5,173			10.000 %	
Overhead and Profit	6,681			10.000 %	
Total				62,598	

LM 00143



Home Office
20 Brucet Court
Greenville, SC 29615
Phone 864-288-3885
Fax 864-234-7020

Anderson Division
111-A Benson Street
Anderson, SC 29624-1585
Phone 864-231-7810
Fax 864-231-7811

SUBCONTRACT CHANGE ORDER

Date	Job	Number	COI
9/27/2010	09-083	09-083.4.14	6
Vendor			
Precision Walls, Inc.			

To:

Precision Walls, Inc.
925 GSP Drive
Greer, SC 29651

JOB SITE:

Tri-County Tech (Occup Bldg)
1774 Powdersville Road
(State Proj No. H59-9980-GW)
Easley, SC 29642

SYS Constructors, Inc. submits a Change Order for the following changes in work:

Includes a reimbursement of the cost created by the faulty tape on the exterior of the building.

Change Order Detail:

DESCRIPTION	AMOUNT												
Masonry Demo & Rebuild	-84,427.00												
Project Management Time	-10,392.00												
Superintendent Time	-9,526.00												
Dumpster Bills	-4,500.00												
All invoices should reflect corresponding job number & subcontract number. All terms and conditions of the original subcontract remain in full effect unless specifically modified here. <table> <tr> <td>Original Subcontract Amount:</td> <td>\$</td> <td>582,587.00</td> </tr> <tr> <td>Change by Previous Change Orders:</td> <td>\$</td> <td>48,697.00</td> </tr> <tr> <td>Net Change this Change Order:</td> <td>\$</td> <td>(108,845.00)</td> </tr> <tr> <td>New Subcontract Amount:</td> <td>\$</td> <td>522,439.00</td> </tr> </table> Please note change in procedure. Please sign and return BOTH copies of the attached document. SYS Constructors will return one (1) fully executed copy to your records. If you have questions regarding attached, please contact our office. Please make changes to this document.		Original Subcontract Amount:	\$	582,587.00	Change by Previous Change Orders:	\$	48,697.00	Net Change this Change Order:	\$	(108,845.00)	New Subcontract Amount:	\$	522,439.00
Original Subcontract Amount:	\$	582,587.00											
Change by Previous Change Orders:	\$	48,697.00											
Net Change this Change Order:	\$	(108,845.00)											
New Subcontract Amount:	\$	522,439.00											
ACCEPTED BY: _____	SYS CONSTRUCTORS, INC.												
TITLE: _____													
DATE: _____	BY: _____												



LM 00104

TERMS AND CONDITIONS

1. Subcontractor shall identify to Contractor in writing, the full-time Subcontractor Superintendent, who shall be acceptable to Contractor.
2. Subcontractor shall provide all necessary materials, equipment, labor and supervision to maintain Contractors Master Schedule.
3. Subcontractor shall be responsible for coordination with other trades, in order to maintain schedule and contract requirements.
4. Contractor may modify Master Schedule of which Subcontractor agrees to adjust to revised schedule.
5. Project work hours are Monday - Thursday (7:00 AM - 5:30 PM). Subcontractor work that may occur outside these stated hours require written permission by the Contractor. Subcontractor may be required to compensate Contractor for overtime Contractor Supervisor.
6. Project work site is under Federal, State, and Local Code and Regulatory Agencies, and Subcontractor is required to adhere to those regulations. Contractor requires each individual to wear hard hats on the project at all times. A Drug-Free atmosphere is required on this project.
7. Shop Drawings and Submittals shall be transmitted to Contractor, in order not to affect delivery date of equipment and materials for Construction Schedule. Submittals shall be stamped by Subcontractor stating that he has reviewed the submittals for compliance of Contract Documents. Shop drawing and Submittal quantities shall be a minimum of four (4) copies each.
8. Invoicing must include Subcontract number and a Partial Release of Lien must accompany each Application for Payment. A Final Release of Lien must be submitted before release of retainage.
9. A current Certificate of Insurance must be on file prior to commencement of work.

LM 00105

Event: 370858600

LM 00265

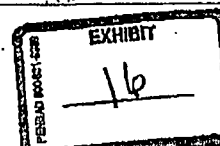
157

APPX 0161

left voice message for jett with chubb to call me back to discuss the wall construction	
Author	JONATHAN WILLIAMS
Topic	Loss Investigation
Related To	Entire event
Subject	WALL CONSTRUCTION
Oct 6, 2010	01:35 PM
	spoke with customer kevin howell, he clarified this loss for me. customer was responsible for part of the exterior wall set-up. they attached exterior sheathing board to metal studs and then attached a 2 in thick layer of rigid insulation (formular). they then taped the insulation joints together with the berry plastic tape to provide an air barrier to prevent moisture penetration. this was the extent of the customer's work. a brick mason then attached brick ties through the insulation to the backing metal studs. a brick wall was then constructed layer by layer. the brick ties were "tied" into the brick mortar joints. when dried, they completed the brick exterior. the GC determined that some of the tape was coming loose. they began to re-tape in some places, as needed. the issue is, that the GC had already instructed the mason to get started on creating the exterior brick wall. the mason had completed one side and began another when instructed to stop because of the developing tape issue. on the completed wall, they drilled a hole from the interior and ran a camera to check on the tape. they discovered that the tape was coming loose behind the brick. the customer was placed on notice of the tape issue and the GC directed the mason to remove/tear down the brick. the customer then tapped the insulation joints with another type of tape. as for the tape, the architect generated specs for the tape needed. the customer's project manager, pate hubbard, located several tapes that met the specs. the PM submitted a recommendation of the berry tape and the architect approved. he noted that an independant sales representative that sells berry products was there, but didn't comment on the issue or express any opinions. PER HIS OPINION, THE TAPE FAILED. kevin agreed to obtain and e-mail the tape submission and approval.
Author	JONATHAN WILLIAMS
Topic	Action Plan

User JONATHAN WILLIAMS

Page 21



03/31/2011 10:57 AM

POLICY CERTIFICATION FORM

RE: NAMED INSURED: PRECISION WALLS INC.
And as per Endorsement 1

POLICY NUMBER: TB2-651-287492-029

EFFECTIVE DATES: 09/30/2009 TO 09/30/2010

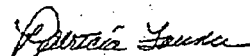
X I certify this is to be a true copy of the original policy issued.

☐ I certify this is to be a true copy of the original Declarations page issued.

☐ I certify this is to be a true copy of the original Uninsured/Underinsured
Motor Rejection and/or the Personal Injury Rejection form(s).

☐ This policy was retrieved from Liberty Mutual's files and is Liberty Mutual's best
current evidence of the policy. Liberty Mutual, however, reserves the right to
supplement or amend this policy should further or different terms, conditions,
endorsements, or exclusions become known. Liberty Mutual does not acknowledge
that this is a certified copy of the policy, or that it is the exact copy of the policy
that was delivered to the Insured.

LIBERTY MUTUAL RESERVES THE RIGHT TO FURTHER AMEND OR SUPPLEMENT THIS
POLICY SHOULD ANY ADDITIONAL TERMS, CONDITIONS OR EXCLUSIONS COME TO
OUR ATTENTION.



Patricia Faunce, MGR-Commercial Markets
UW Support Operations
CMSO Consolidate Operations
Lewiston, Maine

Date: 06/21/2011

POLICYHOLDER DISCLOSURE
TERRORISM RISK INSURANCE ACT

THIS ENDORSEMENT IS MADE PART OF YOUR POLICY PURSUANT TO THE TERRORISM RISK INSURANCE ACT.

In accordance with the Terrorism Risk Insurance Act, including all amendments, ("TRIA" or the "Act"), we are required to provide you with a notice of the portion of your premium attributable to coverage for "certified acts of terrorism," the federal share of payment of losses from such acts, and the limitation or "cap" on our liability under the Act.

Disclosure of Premium

The Company has made available coverage for "certified acts of terrorism" as defined in the Act. If purchased, the portion of your premium attributable to coverage for "certified acts of terrorism" is shown in the Declarations, Declarations Extension Schedule or elsewhere by endorsement in your policy.

Federal Participation In Payment Of Terrorism Losses

If an individual insurer's losses exceed a deductible amount specified in the Act, the federal government will reimburse the insurer for 85% of losses paid in excess of the deductible, provided that aggregate industry losses from a "certified act of terrorism" exceed \$100 million.

Cap On Insurer Participation In Payment Of Terrorism Losses

If aggregate insured losses attributable to "certified acts of terrorism" exceed \$100 billion in a calendar year and we have met our deductible under the Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion. Nor shall Treasury make any payment for any portion of the amount of such losses that exceeds \$100 billion. In such case, insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$ 1,555 Shown on Declarations Page
 Effective Date Expiration Date
 For attachment to Policy No. TB2-651-287492-029
 Audit Basis

Issued To

Dexter R. Laff
 SECRETARY

Charles F. Kelly
 PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 32

GPO 4887 12 07

LM 00003

**Liberty Mutual
Fire Insurance Company**

**COMMERCIAL GENERAL
LIABILITY DECLARATIONS**

ACCOUNT 28 74 92	SUB-ACCT NO. 0000	Liberty Mutual Insurance Group/Boiler					
POLICY NO. TB2-651-287492-029	TD/CO 32/5	SALES OFFICE DULUTH, GA-NATL	CODE 0505	SALES REPRESENTATIVE BEESE	CODE 9906	W/R 2	1 st YR 2006

Item 1. Named Insured Precision Walls Inc. and as per Endorsement 1

 Address 1230 NE Maynard Road
Cary, NC 27513-4174

The named insured is: Corporation

Business of named insured is: Plastering, Drywall/ Insulation

Item 2. Policy Period	From	Mo.	Day	Year	to	Mo.	Day	Year
		09	30	2009		09	30	2010

12:01 A.M., standard time at the address of the named insured as stated herein.

Item 3. In return for the payment of the premium, and subject to all of the terms of this policy, we agree with you to provide the insurance as stated in this policy

LIMITS OF INSURANCE

EACH OCCURRENCE LIMIT	\$ 1,000,000	
DAMAGE TO PREMISES RENTED TO YOU LIMIT	\$ 300,000	Any one premises
MEDICAL EXPENSE LIMIT	\$ 10,000	Any one person
PERSONAL & ADVERTISING INJURY LIMIT	\$ 1,000,000	Any one person or organization
GENERAL AGGREGATE LIMIT	\$ 2,000,000	
PRODUCTS / COMPLETED OPERATIONS AGGREGATE LIMIT	\$ 2,000,000	
Deductible Endorsement Yes ☐ No ☒		

TERRORISM RISK INSURANCE ACT	\$ 1,555
TOTAL ADVANCE PREMIUM	\$ 125,346

The premium for this policy is payable \$ _____ in advance, \$ _____ on first anniversary and \$ _____ on the second anniversary.

Audit Basis: 1 - At Expiration

The declarations are completed on the schedules designated Declarations Extension Schedules

These declarations, together with the Common Policy Conditions and Coverage Form(s) and any endorsement(s) complete the above numbered policy.

Forms and endorsements attached to this policy: See attached forms and endorsements schedule

This policy, including all endorsements issued herewith, is hereby countersigned by _____

"N"1N00"

Authorized Representative

Loc. Code	Typed	Periodic Payment	Rating Basis	Audit Basis	Home State	Pol. H. G.	Renewal of
	LM 10/30/2009	\$	NR	1	NC	S- ☐	TB2-151-287492-028

GPO 4081 R3

LM 00004

Declarations Extension Schedule

Classifications And Locations	Code No	Premium Base	Rates	Advance Premiums
		GL Payroll	per \$100 GL Payroll	
All Operations of the Named Insured	15250	25,104,702	DE) 0.4931	123,791
Minimum Premium: \$99,033				
Coverage provided for acts of terrorism certified under the Terrorism Risk Insurance Act (TRIA)	22222	Flat Charge		1,555
DE) Discounted Excess Rate				
M = Minimum Premium			Total:	125,346

GPO 4054 R1 .

Policy No: TB2-651-287492-029

Page 1

SCHEDULE OF FORMS AND ENDORSEMENTS

<u>Form Number</u>	<u>Form Name</u>	<u>Endorsement Number</u>	<u>Comments / Expiring End.</u>
GPO 4613 R1	Policy Cover		
GPO 4081 R3	Com'l General Liability Declaration		
GPO 4054 R1	Declarations Extension Schedule		
LN 99 05 07 05	Broad Form Named Insured Endorsement	1	
LC 99 12 06 05	Composite Rate Endorsement	2	
CG 02 24 10 93	Earlier Notice of Cancellation Provided By Us	3	
CG 04 35 12 07	Employee Benefits Liability Coverage	4	
LC 04 01 06 05	Reasonable Force	5	
LC 04 02 06 05	Professional Health Care Services by Employee Coverage	6	
LC 04 04 06 05	Bodily Injury to Co-Employee Coverage	7	
LN 04 05 06 05	Broadened Damage To Premises Rented To You Coverage	8	
→ CG 20 10 07 04	Additional Insured-Owners, Lessees or Contractors-Scheduled Person or Organization	9	}
CG 20 12 05 09	Additional Insured - State or Governmental Agency or Subdivision or Political Subdivision-Permits or	10	
CG 20 37 07 04	Additional Insured-Owners, Lessees or Contractors-Completed Operations	11	
LN 20 01 06 05	Blanket Additional Insured	12	
CG 00 63 05 09	Recording and Distribution of Material or Information in Violation of Law Exclusion	13	
CG 21 47 12 07	Employment - Related Practices Exclusion	14	
CG 21 49 09 99	Total Pollution Exclusion Endorsement	15	
CG 21 67 12 04	Fungi Or Bacteria Exclusion	16	
IL 00 21 09 08	Nuclear Energy Liability Exclusion Endorsement	17	
LC 21 01 06 05	Asbestos Exclusion	18	
LC 21 02 06 05	Silica Exclusion	19	
LC 21 04 06 05	Discrimination Exclusion	20	
CG 24 04 05 09	Waiver of Transfer of Rights of Recovery Against Others to Us	21	
LN 24 02 06 05	Excess Provision - Consolidated (Wrap-Up) Insurance Program	22	

Policy No. TB2-651-287492-029

Page 1 of 2

SCHEDULE OF FORMS AND ENDORSEMENTS

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LC 29 01 05 06	Coverage Territory Redefined	24
LN 29 03 06 05	Bodily Injury Redefined	25
LN 29 06 06 05	Advertisement Redefined	26
LG 3178 05 05	Per Project and Per Location Combined Aggregate Limits-With Optional Capped Limits Endorsement	27
LC 99 01 06 05	Notice of Occurrence	28
LC 99 02 06 07	Knowledge of Occurrence	29
LC 99 03 06 07	Unintentional Failure to Disclose	30
LN 99 04 06 05	Premium Responsibility Endorsement	31
GPO 4857 12 07	Policyholder Disclosure - Terrorism Risk Insurance Act	32
OG 21 70 01 08	Cap On Losses From Certified Acts Of Terrorism	33
CG 21 76 01 08	Exclusion of Punitive Damages Related To A Certified Act Of Terrorism	34
CG 26 86 01 08	Arkansas Exclusion of Punitive Damages Related To A Certified Act Of Terrorism	35
CG 26 93 01 08	Alaska Exclusion of Punitive Damages Related To A Certified Act Of Terrorism	36
IL 02 69 09 08	NC Changes - Cancellation and Nonrenewal	37
IL 00 17 11 98	Common Policy Conditions	
CG 00 01 12 07	Commercial General Liability Coverage Form	
GPO4079 R2 03 01 02	Liability Policy Dividend Conditions	

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BROAD FORM NAMED INSURED ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE FORM

1. The term Named Insured includes in addition to the person or organization designated in the Declarations as the First Named Insured:

- a. See Attached Schedule

but only while the First Named Insured directly or indirectly owns, during the policy period, an interest therein of more than 50% (fifty percent); and

- b. subject to 1.a. above, any other organization (except for a partnership or joint venture) incorporated or organized under the laws of the United States of America or its states, territories or possessions, Puerto Rico, Canada or its provinces, but only while the First Named Insured or any of the Named Insureds in 1.a. above directly or indirectly owns, during the policy period, an interest therein of more than 50%. But

None of the above-designated persons or organizations is a Named Insured with respect to:

- (1) "bodily injury" or "property damage" that occurred, or
- (2) "personal and advertising injury" caused by an offense or a series of related offenses committed,

prior to the ownership interests described in Item 1.a or b above.

A partnership or joint venture is not a Named Insured unless it is shown in 1.a. above. No person or organization is an insured with respect to the conduct of any current or past partnership or joint venture that is not shown as a Named Insured in 1.a. above or for any limited liability company that is not a Named Insured.

2. Paragraph 3. of SECTION II - WHO IS AN INSURED is deleted.
3. The First Named Insured is authorized to act and agrees to act on behalf of all persons or organizations insured under this policy with respect to all matters pertaining to the insurance afforded by the policy.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lay
SECRETARY

Edward F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 1

LN 99 05 07 05

LM 00008

NAMED INSURED ENDORSEMENT

Design Specialties, Inc.
Beryl Road Properties
Allen Leasing Company
Precision Management Company
Allen Motorsports, Inc.
401 Realty Company dba Allen Real Estate
Partitions of the Carolinas
Advanced Exterior Systems, LLC
1230 NE Maynard Rd, Assocd, LLC

For Attachment to
Policy No. TB2-651-287492-029

Page 1

End No. 1

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COMPOSITE RATE ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
 EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART
 GARAGE COVERAGE PART
 LIQUOR LIABILITY COVERAGE PART
 MOTOR TRUCK CARGO COVERAGE PART
 OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
 POLLUTION LIABILITY COVERAGE PART
 PRINTERS LIABILITY COVERAGE PART
 PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
 RAILROAD PROTECTIVE LIABILITY COVERAGE PART
 SPECIAL PROTECTIVE AND HIGHWAY LIABILITY POLICY - NEW YORK
 WAREHOUSEMEN'S LIABILITY COVERAGE PART

The composite rated premium for this policy shall be computed on the following basis:

Rate	Rate Basis	Exposure Type
.4921	☐ Per 1	☐ Sales (Including Foreign)
	☒ Per 100	☐ Sales (Excluding Foreign)
	☐ Per 1,000	☐ Square Feet
	☐ Other (Defined Below)	☐ Workers Compensation Payroll
		☒ General Liability Payroll
		☐ Other (Defined Below)

Rate Basis Other means:

Exposure Types are defined as:

Sales (Including Foreign) means the gross amount charged by you, your concessionaires or by others trading under your name for all goods or products sold or distributed during the policy period, operations performed during the policy period and rentals both in the United States of America, its territories and possessions and outside the United States of America, its territories and possessions. Sales includes taxes, foreign exchange discounts, freight allowance to customers, total sales of consigned goods and warehouse receipts, trade or cash discounts, bad debts, and repossessions of items sold on installments.

Sales (Excluding Foreign) means the gross amount charged by you, your concessionaires or by others trading under your name for all goods or products sold or distributed during the policy period, operations performed during the policy period and rentals only in the United States of America, its territories and possessions. Sales includes taxes, foreign exchange discounts, freight allowance to customers, total sales of consigned goods and warehouse receipts, trade or cash discounts, bad debts, and repossessions of items sold on installments.

Square Feet means area, as measured in square feet, of all property you own, lease or rent, including land held for investment, during the policy period.

Workers Compensation Payroll means all payments by you in money, or in substitutes for money during the policy period to all executive officers and other employers for services rendered, subject to any over-time earnings, limitation of remuneration or exception rules applicable in accordance with the Workers Compensation manual in use by the Company.

General Liability Payroll means all payments by you in money, or in substitutes for money, during the policy period to all executive officers and other employees for services rendered, subject to any over-time earnings, limitation of remuneration or exception rules applicable in accordance with the General Liability manual in use by the Company.

Other means:

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter P. Lapp
SECRETARY

Charles F. Keff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 2

LC 99 12 06 05

Page 2 of 2

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**EARLIER NOTICE OF CANCELLATION
PROVIDED BY US**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Number of Days' Notice 60

(if no entry appears above, information required to complete this Schedule will be shown in the Declarations as applicable to this endorsement.)

For any statutorily permitted reason other than nonpayment of premium, the number of days required for notice of cancellation, as provided in paragraph 2. of either the CANCELLATION Common Policy Condition or as amended by an applicable state cancellation endorsement, is increased to the number of days shown in the Schedule above.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No. TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Legg
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 3

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYEE BENEFITS LIABILITY COVERAGE

THIS ENDORSEMENT PROVIDES CLAIMS-MADE COVERAGE.
PLEASE READ THE ENTIRE ENDORSEMENT CAREFULLY.

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Coverage	Limit Of Insurance	Each Employee Deductible	Premium
Employee Benefits Programs	\$ 1,000,000 each employee	\$	\$ Included
	\$ 1,000,000 aggregate		
Retroactive Date:			
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.			

A. The following is added to Section I – Coverages:

COVERAGE – EMPLOYEE BENEFITS LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of any act, error or omission, of the insured, or of any other person for whose acts the insured is legally liable, to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages to which this insurance does not apply. We may, at our discretion, investigate any report of an act, error or omission and settle any "claim" or "suit" that may result. But

- (1) The amount we will pay for damages is limited as described in Paragraph D. (Section III – Limits Of Insurance); and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments.

b. This insurance applies to damages only if:

- (1) The act, error or omission, is negligently committed in the "administration" of your "employee benefit program";
- (2) The act, error or omission, did not take place before the Retroactive Date, if any, shown in the Schedule nor after the end of the policy period; and
- (3) A "claim" for damages, because of an act, error or omission, is first made against any insured, in accordance with Paragraph c. below, during the policy period or an Extended Reporting Period we provide under Paragraph F. of this endorsement.

c. A "claim" seeking damages will be deemed to have been made at the earlier of the following times:

- (1) When notice of such "claim" is received and recorded by any Insured or by us, whichever comes first; or

- (2) When we make settlement in accordance with Paragraph a. above.

A "claim" received and recorded by the insured within 60 days after the end of the policy period will be considered to have been received within the policy period, if no subsequent policy is available to cover the claim.

- d. All "claims" for damages made by an "employee" because of any act, error or omission, or a series of related acts, errors or omissions, including damages claimed by such "employee's" dependents and beneficiaries, will be deemed to have been made at the time the first of those "claims" is made against any insured.

2. Exclusions

This insurance does not apply to:

a. Dishonest, Fraudulent, Criminal Or Malicious Act

Damages arising out of any intentional, dishonest, fraudulent, criminal or malicious act, error or omission, committed by any insured, including the willful or reckless violation of any statute.

b. Bodily Injury, Property Damage, Or Personal And Advertising Injury

"Bodily injury", "property damage" or "personal and advertising injury".

c. Failure To Perform A Contract

Damages arising out of failure of performance of contract by any insurer.

d. Insufficiency Of Funds

Damages arising out of an insufficiency of funds to meet any obligations under any plan included in the "employee benefit program".

e. Inadequacy Of Performance Of Investment/Advice Given With Respect To Participation

Any "claim" based upon:

- (1) Failure of any investment to perform;
- (2) Errors in providing information on past performance of investment vehicles; or
- (3) Advice given to any person with respect to that person's decision to participate or not to participate in any plan included in the "employee benefit program".

f. Workers' Compensation And Similar Laws

Any "claim" arising out of your failure to comply with the mandatory provisions of any workers' compensation, unemployment compensation insurance, social security or disability benefits law or any similar law.

g. ERISA

Damages for which any insured is liable because of liability imposed on a fiduciary by the Employee Retirement Income Security Act of 1974, as now or hereafter amended, or by any similar federal, state or local laws.

h. Available Benefits

Any "claim" for benefits to the extent that such benefits are available, with reasonable effort and cooperation of the insured, from the applicable funds accrued or other collectible insurance.

i. Taxes, Fines Or Penalties

Taxes, fines or penalties, including those imposed under the Internal Revenue Code or any similar state or local law.

j. Employment-Related Practices

Damages arising out of wrongful termination of employment, discrimination, or other employment-related practices.

B. For the purposes of the coverage provided by this endorsement:

1. All references to Supplementary Payments – Coverages A and B are replaced by Supplementary Payments – Coverages A, B and Employee Benefits Liability.

2. Paragraphs 1.b. and 2. of the Supplementary Payments provision do not apply.

C. For the purposes of the coverage provided by this endorsement, Paragraphs 2. and 3. of Section II – Who Is An Insured are replaced by the following:

2. Each of the following is also an insured:

- a. Each of your "employees" who is or was authorized to administer your "employee benefit program".
- b. Any persons, organizations or "employees" having proper temporary authorization to administer your "employee benefit program" if you die, but only until your legal representative is appointed.

- c. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Endorsement.
 - 3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured. If no other similar insurance applies to that organization. However:
 - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier.
 - b. Coverage under this provision does not apply to any act, error or omission that was committed before you acquired or formed the organization.
 - D. For the purposes of the coverage provided by this endorsement, Section III - Limits Of Insurance is replaced by the following:
 - 1. Limits Of Insurance
 - a. The Limits of Insurance shown in the Schedule and the rules below fix the most we will pay regardless of the number of:
 - (1) Insureds;
 - (2) "Claims" made or "suits" brought;
 - (3) Persons or organizations making "claims" or bringing "suits";
 - (4) Acts, errors or omissions; or
 - (5) Benefits included in your "employee benefit program".
 - b. The Aggregate Limit is the most we will pay for all damages because of acts, errors or omissions negligently committed in the "administration" of your "employee benefit program".
 - c. Subject to the Aggregate Limit, the Each Employee Limit is the most we will pay for all damages sustained by any one "employee", including damages sustained by such "employee's" dependents and beneficiaries, as a result of:
 - (1) An act, error or omission; or
 - (2) A series of related acts, errors or omissions negligently committed in the "administration" of your "employee benefit program".
- However, the amount paid under this endorsement shall not exceed, and will be subject to, the limits and restrictions that apply to the payment of benefits in any plan included in the "employee benefit program".

The Limits of Insurance of this endorsement apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations of the policy to which this endorsement is attached, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits Of Insurance.

2. Deductible

- a. Our obligation to pay damages on behalf of the insured applies only to the amount of damages in excess of the deductible amount stated in the Schedule as applicable to Each Employee. The limits of insurance shall not be reduced by the amount of this deductible.
- b. The deductible amount stated in the Schedule applies to all damages sustained by any one "employee", including such "employee's" dependents and beneficiaries, because of all acts, errors or omissions to which this insurance applies.
- c. The terms of this insurance, including those with respect to:
 - (1) Our right and duty to defend any "suits" seeking those damages; and
 - (2) Your duties, and the duties of any other involved insured, in the event of an act, error or omission, or "claim"
 apply irrespective of the application of the deductible amount.
- d. We may pay any part or all of the deductible amount to effect settlement of any "claim" or "suit" and, upon notification of the action taken, you shall promptly reimburse us for such part of the deductible amount as we have paid.
- E. For the purposes of the coverage provided by this endorsement, Conditions 2. and 4. of Section IV - Commercial General Liability Conditions are replaced by the following:
 - 2. Duties In The Event Of An Act, Error Or Omission, Or "Claim" Or "Suit"
 - a. You must see to it that we are notified as soon as practicable of an act, error or omission which may result in a "claim". To the extent possible, notice should include:
 - (1) What the act, error or omission was and when it occurred; and

- (2) The names and addresses of anyone who may suffer damages as a result of the act, error or omission.
- b. If a "claim" is made or "suit" is brought against any insured, you must:
 - (1) Immediately record the specifics of the "claim" or "suit" and the date received; and
 - (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the "claim" or "suit" as soon as practicable.
- c. You and any other involved insured must:
 - (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "claim" or "suit";
 - (2) Authorize us to obtain records and other information;
 - (3) Cooperate with us in the investigation or settlement of the "claim" or defense against the "suit"; and
 - (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of an act, error or omission to which this insurance may also apply.
- d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation or incur any expense without our consent.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under this endorsement, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

b. Excess Insurance

- (1) This insurance is excess over any of the other insurance, whether primary, excess, contingent or on any other basis that is effective prior to the beginning of the policy period shown in the Schedule of this insurance and that applies to an act, error or omission on other than a claims-made basis, if:
 - (a) No Retroactive Date is shown in the Schedule of this insurance; or
 - (b) The other insurance has a policy period which continues after the Retroactive Date shown in the Schedule of this insurance.
- (2) When this insurance is excess, we will have no duty to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.
- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of the total amount that all such other insurance would pay for the loss in absence of this insurance; and the total of all deductible and self-insured amounts under all that other insurance.
- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Schedule of this endorsement.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limits of insurance to the total applicable limits of insurance of all insurers.

- F. For the purposes of the coverage provided by this endorsement, the following Extended Reporting Period provisions are added, or, if this endorsement is attached to a claims-made Coverage Part, replaces any similar Section in that Coverage Part:

EXTENDED REPORTING PERIOD

1. You will have the right to purchase an Extended Reporting Period, as described below, if:
 - a. This endorsement is canceled or not renewed; or
 - b. We renew or replace this endorsement with insurance that:
 - (1) Has a Retroactive Date later than the date shown in the Schedule of this endorsement; or
 - (2) Does not apply to an act, error or omission on a claims-made basis.
2. The Extended Reporting Period does not extend the policy period or change the scope of coverage provided. It applies only to "claims" for acts, errors or omissions that were first committed before the end of the policy period but not before the Retroactive Date, if any, shown in the Schedule. Once in effect, the Extended Reporting Period may not be canceled.
3. An Extended Reporting Period of five years is available, but only by an endorsement and for an extra charge.

You must give us a written request for the endorsement within 60 days after the end of the policy period. The Extended Reporting Period will not go into effect unless you pay the additional premium promptly when due.

We will determine the additional premium in accordance with our rules and rates. In doing so, we may take into account the following:

- a. The "employee benefit programs" insured;
- b. Previous types and amounts of insurance;
- c. Limits of insurance available under this endorsement for future payment of damages; and
- d. Other related factors.

The additional premium will not exceed 100% of the annual premium for this endorsement.

The Extended Reporting Period endorsement applicable to this coverage shall set forth the terms, not inconsistent with this Section, applicable to the Extended Reporting Period, including a provision to the effect that the insurance afforded for "claims" first received during such period is excess over any other valid and collectible insurance available under policies in force after the Extended Reporting Period starts.

4. If the Extended Reporting Period is in effect, we will provide an extended reporting period aggregate limit of insurance described below, but only for claims first received and recorded during the Extended Reporting Period.

The extended reporting period aggregate limit of insurance will be equal to the dollar amount shown in the Schedule of this endorsement under Limits of insurance.

Paragraph D.1.b. of this endorsement will be amended accordingly. The Each Employee Limit shown in the Schedule will then continue to apply as set forth in Paragraph D.1.c.

- G. For the purposes of the coverage provided by this endorsement, the following definitions are added to the Definitions Section:

1. "Administration" means:

- a. Providing information to "employees", including their dependents and beneficiaries, with respect to eligibility for or scope of "employee benefit programs";
- b. Handling records in connection with the "employee benefit program"; or
- c. Effecting, continuing or terminating any "employee's" participation in any benefit included in the "employee benefit program".

However, "administration" does not include handling payroll deductions.

2. "Cafeteria plans" means plans authorized by applicable law to allow employees to elect to pay for certain benefits with pre-tax dollars.
3. "Claim" means any demand, or "suit", made by an "employee" or an "employee's" dependents and beneficiaries, for damages as the result of an act, error or omission.

4. "Employee benefit program" means a program providing some or all of the following benefits to "employees", whether provided through a "cafeteria plan" or otherwise:
- a. Group life insurance, group accident or health insurance, dental, vision and hearing plans, and flexible spending accounts, provided that no one other than an "employee" may subscribe to such benefits and such benefits are made generally available to those "employees" who satisfy the plan's eligibility requirements;
 - b. Profit sharing plans, employee savings plans, employee stock ownership plans, pension plans and stock subscription plans, provided that no one other than an "employee" may subscribe to such benefits and such benefits are made generally available to all "employees" who are eligible under the plan for such benefits;
 - c. Unemployment insurance, social security benefits, workers' compensation and disability benefits;
 - d. Vacation plans, including buy and sell programs; leave of absence programs, including military, maternity, family, and civil leave; tuition assistance plans; transportation and health club subsidies; and
 - e. Any other similar benefits designated in the Schedule or added thereto by endorsement.
- H. For the purposes of the coverage provided by this endorsement, Definitions 5. and 18. in the Definitions Section are replaced by the following:
- 5. "Employee" means a person actively employed, formerly employed, on leave of absence or disabled, or retired. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
 - 18. "Suit" means a civil proceeding in which damages because of an act, error or omission to which this insurance applies are alleged. "Suit" includes:
 - a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
 - b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lapp
SECRETARY

Edward F. Maff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End, Serial No. 4

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

REASONABLE FORCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion ~~a~~ of COVERAGE A is replaced by the following:

2. Expected or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" or "property damage" resulting from the use of reasonable force to protect persons or property.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

For attachment to Policy No.

Audit Basis

Expiration Date
TB2-651-287492-029

Issued To

Dexter P. Laff
SECRETARY

Edward F. Hoff
PRESIDENT

Counterigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 5

LC 04 01 0605

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PROFESSIONAL HEALTH CARE SERVICES BY EMPLOYEES COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE FORM

1. Amendment - Who is an Insured

Subparagraphs 2. a. (1) (d) of SECTION II - WHO IS AN INSURED is deleted and replaced with the following:

(d) Arising out of his or her providing or failing to provide professional health care services. However, any "employee" or "volunteer worker" of the Named Insured who is a "designated health care provider" is an insured under this policy with respect to "bodily injury" and "personal and advertising injury":

- a. Which arises out of the providing of or failure to provide professional health care services; and
- b. Which occurs in the course of and within the scope of such "employee's" or "volunteer worker's" employment by the Named Insured.

2. Limits of Insurance

a. Sublimit Each Occurrence. This insurance is subject to a sublimit of:

\$_____ each occurrence.

This sublimit is subject to the Each Occurrence Limit shown in the Declarations; it is not in addition of the Each Occurrence Limit.

If a sublimit is not designated above, the applicable limit is the Each Occurrence Limit shown in the Declarations.

b. Aggregate. This insurance is subject to the General Aggregate Limit shown in the Declarations.

3. With respect to "employees" and "volunteer workers" providing professional health care services, the following exclusions are added to Paragraph 2, Exclusions of Section I - Coverage A - Bodily Injury And Property Damage and Paragraph 2, Exclusions of Section I - Coverage B - Personal And Advertising Injury:

This insurance does not apply to:

- a. Liability assumed under an "insured contract" or any other contract or agreement;
- b. Liability arising out of the providing of professional health care services in violation of law;
- c. Liability arising out of the providing of any professional health care services while in any degree under the influence of intoxicants or narcotics;
- d. Liability arising out of any dishonest, fraudulent, malicious or knowingly wrongful act or failure to act; or
- e. Punitive or exemplary damages, fines or penalties.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BODILY INJURY TO CO-EMPLOYEES COVERAGE

This endorsement modifies insurance provided under the following:

**COMMERCIAL GENERAL LIABILITY COVERAGE FORM
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE FORM**

1. The following is added to Paragraph 2. of the WHO IS AN INSURED section:

Your "employees" (other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company)) or "volunteer workers" are insureds while in the course of their employment or performing duties related to the conduct of your business with respect to "bodily injury":

- (a) to you;
- (b) to your partners or members (if partnership or joint venture);
- (c) to your members (if you are a limited liability company); or
- (d) to a co-"employee" or "volunteer worker" while that co-"employee" or "volunteer worker" is either in the course of his or her employment by you or while performing duties related to the conduct of your business (including participation in any recreational activities sponsored by you).

However, none of these "employees" or "volunteer workers" are insureds for the providing of or failure to provide professional health care services.

2. Limits of Insurance

a. Sublimit Each Occurrence. This insurance is subject to a sublimit of:

\$ _____ each occurrence.

This sublimit is subject to the Each Occurrence Limit shown in the Declarations; it is not in addition to the Each Occurrence Limit.

If a sublimit is not designated above, the applicable limit is the Each Occurrence Limit shown in the Declarations.

b. Aggregate. This insurance is subject to the General Aggregate Limit shown in the Declarations.

3. The insurance provided by this endorsement for "bodily injury" to a co-"employee" or "volunteer worker" will not apply if the injured co-"employee's" or "volunteer worker's" sole remedy for such injury is provided under a workers' compensation law or any similar law.

LM 00021

4. The insurance provided by this endorsement is excess over any other valid and collectible insurance available to the insured, whether primary, excess, contingent or on any other basis

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Laff
SECRETARY

Charles F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 7

LC 04 04 06 05

Page 2 of 2

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BROADENED DAMAGE TO PREMISES RENTED TO YOU COVERAGE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

The paragraph at the end of Paragraph 2, Exclusions of Coverage A, BODILY INJURY AND PROPERTY DAMAGE LIABILITY is deleted and replaced with the following:

Exclusions c. through n. do not apply to damage by fire, lightning, or explosion to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in SECTION III - LIMITS OF INSURANCE

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. J. J.
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 8

LN 04 05 05 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location(s) Of Covered Operations
Any additional insured party that will not accept their LN 20 10 06 05 and otherwise qualifies for additional insured	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

A. Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" caused, in whole or in part, by:

1. Your acts or omissions; or
2. The acts or omissions of those acting on your behalf;

in the performance of your ongoing operations for the additional insured(s) at the location(s) designated above.

B. With respect to the insurance afforded to these additional insureds, the following additional exclusions apply:

This insurance does not apply to "bodily injury" or "property damage" occurring after:

1. All work, including materials, parts or equipment furnished in connection with such work, on the project (other than service, maintenance or repairs) to be performed by or on behalf of the additional insured(s) at the location of the covered operations has been completed; or

2. That portion of "your work" out of which the injury or damage arises has been put to its intended use by any person or organization other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No. TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lapp
SECRETARY

Edward F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 9

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

**ADDITIONAL INSURED – STATE OR GOVERNMENTAL
AGENCY OR SUBDIVISION OR POLITICAL
SUBDIVISION – PERMITS OR AUTHORIZATIONS**

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

State Or Governmental Agency Or Subdivision Or Political Subdivision:

As required by written contract

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

Section II – Who Is An Insured is amended to include as an insured any state or governmental agency or subdivision or political subdivision shown in the Schedule, subject to the following provisions:

1. This insurance applies only with respect to operations performed by you or on your behalf for which the state or governmental agency or subdivision or political subdivision has issued a permit or authorization.

2. This insurance does not apply to:

- a. "Bodily injury", "property damage" or "personal and advertising injury" arising out of operations performed for the federal government, state or municipality; or
- b. "Bodily injury" or "property damage" included within the "products-completed operations hazard".

This endorsement is created by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TBZ-651-287492-029

Audit Basis

Issued To

Dexter R. Lay
SECRETARY

Edward F. Hill
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 10

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location And Description Of Completed Operations
Any additional insured party that will not accept the LN 20 10 06 05 and otherwise qualifies for addi- tional insured status	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Long
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 11

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BLANKET ADDITIONAL INSURED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

SECTION II - WHO IS AN INSURED is amended to include as an insured any person or organization for whom you have agreed in writing to provide liability insurance. But:

The insurance provided by this amendment:

1. Applies only to "bodily injury" or "property damage" arising out of (a) "your work" or (b) premises or other property owned by or rented to you;
2. Applies only to coverage and minimum limits of insurance required by the written agreement, but in no event exceeds either the scope of coverage or the limits of insurance provided by this policy; and
3. Does not apply to any person or organization for whom you have procured separate liability insurance while such insurance is in effect, regardless of whether the scope of coverage or limits of insurance of this policy exceed those of such other insurance or whether such other insurance is valid and collectible.

The following provisions also apply:

1. Where the applicable written agreement requires the insured to provide liability insurance on a primary, excess, contingent, or any other basis, this policy will apply solely on the basis required by such written agreement and Item 4. Other Insurance of SECTION IV of this policy will not apply.
2. Where the applicable written agreement does not specify on what basis the liability insurance will apply, the provisions of Item 4. Other Insurance of SECTION IV of this policy will govern.
3. This endorsement shall not apply to any person or organization for any "bodily injury" or "property damage" if any other additional insured endorsement on this policy applies to that person or organization with regard to the "bodily injury" or "property damage".
4. If any other additional insured endorsement applies to any person or organization and you are obligated under a written agreement to provide liability insurance on a primary, excess, contingent, or any other basis for that additional insured, this policy will apply solely on the basis required by such written agreement and Item 4. Other Insurance of SECTION IV of this policy will not apply, regardless of whether the person or organization has available other valid and collectible insurance. If the applicable written agreement does not specify on what basis the liability insurance will apply, the provisions of Item 4. Other Insurance of SECTION IV of this policy will govern.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Laff
SECRETARY

Edward F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 12

LN 20 01 06 05

RECORDING AND DISTRIBUTION OF MATERIAL OR INFORMATION IN VIOLATION OF LAW EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. Exclusion q. of Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

q. Recording And Distribution Of Material Or Information In Violation Of Law

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or
- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

B. Exclusion p. of Paragraph 2. Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability is replaced by the following:

2. Exclusions

This insurance does not apply to:

p. Recording And Distribution Of Material Or Information In Violation Of Law

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law;
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law;
- (3) The Fair Credit Reporting Act (FCRA), and any amendment of or addition to such law, including the Fair and Accurate Credit Transaction Act (FACTA); or

- (4) Any federal, state or local statute, ordinance or regulation, other than the TCPA, CAN-SPAM Act of 2003 or FCRA and their amendments and additions, that addresses, prohibits, or limits the printing, dissemination, disposal, collecting, recording, sending, transmitting, communicating or distribution of material or information.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lapp
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 13

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EMPLOYMENT-RELATED PRACTICES EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

This insurance does not apply to:

"Bodily injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "bodily injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

- (1) Whether the injury-causing event described in Paragraphs (a), (b) or (c) above occurs before employment, during employment or after employment of that person;
- (2) Whether the insured may be liable as an employer or in any other capacity; and
- (3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

B. The following exclusion is added to Paragraph 2., Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

This insurance does not apply to:

"Personal and advertising injury" to:

- (1) A person arising out of any:
 - (a) Refusal to employ that person;
 - (b) Termination of that person's employment; or
 - (c) Employment-related practices, policies, acts or omissions, such as coercion, demotion, evaluation, reassignment, discipline, defamation, harassment, humiliation, discrimination or malicious prosecution directed at that person; or
- (2) The spouse, child, parent, brother or sister of that person as a consequence of "personal and advertising injury" to that person at whom any of the employment-related practices described in Paragraphs (a), (b), or (c) above is directed.

This exclusion applies:

(1) Whether the injury-causing event described in Paragraphs (a), (b), or (c) above occurs before employment, during employment or after employment of that person;

(2) Whether the insured may be liable as an employer or in any other capacity; and

(3) To any obligation to share damages with or repay someone else who must pay damages because of the injury.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Long
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 14

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

TOTAL POLLUTION EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion f. under Paragraph 2., Exclusions of Section 1 - Coverage A - Bodily Injury And Property Damage Liability is replaced by the following:

This insurance does not apply to:

f. Pollution

- (1) "Bodily Injury" or "property damage" which would not have occurred in whole or part but for the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

- (2) Any loss, cost or expense arising out of any:

(a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of "pollutants"; or

(b) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter B. Laff
SECRETARY

Laurel F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 15

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

FUNGI OR BACTERIA EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

A. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage A – Bodily Injury And Property Damage Liability:

2. Exclusions

This insurance does not apply to:

Fungi Or Bacteria

a. "Bodily injury" or "property damage" which would not have occurred, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of, any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury or damage.

b. Any loss, cost or expenses arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

This exclusion does not apply to any "fungi" or bacteria that are, are on, or are contained in, a good or product intended for bodily consumption.

B. The following exclusion is added to Paragraph 2. Exclusions of Section I – Coverage B – Personal And Advertising Injury Liability:

2. Exclusions

This insurance does not apply to:

Fungi Or Bacteria

a. "Personal and advertising injury" which would not have taken place, in whole or in part, but for the actual, alleged or threatened inhalation of, ingestion of, contact with, exposure to, existence of, or presence of any "fungi" or bacteria on or within a building or structure, including its contents, regardless of whether any other cause, event, material or product contributed concurrently or in any sequence to such injury.

b. Any loss, cost or expense arising out of the abating, testing for, monitoring, cleaning up, removing, containing, treating, detoxifying, neutralizing, remediating or disposing of, or in any way responding to, or assessing the effects of, "fungi" or bacteria, by any insured or by any other person or entity.

C. The following definition is added to the Definitions Section:

"Fungi" means any type or form of fungus, including mold or mildew and any mycotoxins, spores, scents or byproducts produced or released by fungi.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lay
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 16

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NUCLEAR ENERGY LIABILITY EXCLUSION ENDORSEMENT

(Broad Form)

This endorsement modifies insurance provided under the following:

COMMERCIAL AUTOMOBILE COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
FARM COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

1. The insurance does not apply:

A. Under any Liability Coverage, to "bodily injury" or "property damage":

- (1) With respect to which an "insured" under the policy is also an insured under a nuclear energy liability policy issued by Nuclear Energy Liability Insurance Association, Mutual Atomic Energy Liability Underwriters, Nuclear Insurance Association of Canada or any of their successors, or would be an insured under any such policy but for its termination upon exhaustion of its limit of liability; or
- (2) Resulting from the "hazardous properties" of "nuclear material" and with respect to which (a) any person or organization is required to maintain financial protection pursuant to the Atomic Energy Act of 1954, or any law amendatory thereof, or (b) the "insured" is, or had this policy not been issued would be, entitled to indemnity from the United States of America, or any agency thereof, under any agreement entered into by the United States of America, or any agency thereof, with any person or organization.

B. Under any Medical Payments coverage, to expenses incurred with respect to "bodily injury" resulting from the "hazardous properties" of "nuclear material" and arising out of the operation of a "nuclear facility" by any person or organization.

C. Under any Liability Coverage, to "bodily injury" or "property damage" resulting from "hazardous properties" of "nuclear material", if:

- (1) The "nuclear material" (a) is at any "nuclear facility" owned by, or operated by or on behalf of, an "insured" or (b) has been discharged or dispersed therefrom;
- (2) The "nuclear material" is contained in "spent fuel" or "waste" at any time possessed, handled, used, processed, stored, transported or disposed of, by or on behalf of an "insured"; or
- (3) The "bodily injury" or "property damage" arises out of the furnishing by an "insured" of services, materials, parts or equipment in connection with the planning, construction, maintenance, operation or use of any "nuclear facility", but if such facility is located within the United States of America, its territories or possessions or Canada, this exclusion (3) applies only to "property damage" to such "nuclear facility" and any property thereat.

2. As used in this endorsement:

"Hazardous properties" includes radioactive, toxic or explosive properties.

"Nuclear material" means "source material", "special nuclear material" or "by-product material".

"Source material", "special nuclear material", and "by-product material" have the meanings given them in the Atomic Energy Act of 1954 or in any law amendatory thereof.

"Spent fuel" means any fuel element or fuel component, solid or liquid, which has been used or exposed to radiation in a "nuclear reactor".

"Waste" means any waste material (a) containing "by-product material" other than the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its "source material" content, and (b) resulting from the operation by any person or organization of any "nuclear facility" included under the first two paragraphs of the definition of "nuclear facility".

"Nuclear facility" means:

- (a) Any "nuclear reactor";
- (b) Any equipment or device designed or used for (1) separating the isotopes of uranium or plutonium, (2) processing or utilizing "spent fuel", or (3) handling, processing or packaging "waste";

- (c) Any equipment or device used for the processing, fabricating or alloying of "special nuclear material" if at any time the total amount of such material in the custody of the "insured" at the premises where such equipment or device is located consists of or contains more than 25 grams of plutonium or uranium 233 or any combination thereof, or more than 250 grams of uranium 235;

- (d) Any structure, basin, excavation, premises or place prepared or used for the storage or disposal of "waste";

and includes the site on which any of the foregoing is located, all operations conducted on such site and all premises used for such operations.

"Nuclear reactor" means any apparatus designed or used to sustain nuclear fission in a self-supporting chain reaction or to contain a critical mass of fissionable material.

"Property damage" includes all forms of radioactive contamination of property.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Long
SECRETARY

James F. Kelly
PRESIDENT

Counsigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 17

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ASBESTOS EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART
GARAGE COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
MOTOR TRUCK CARGO COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRINTERS LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
SPECIAL PROTECTIVE AND HIGHWAY LIABILITY POLICY - NEW YORK
WAREHOUSEMAN'S LEGAL LIABILITY COVERAGE PART

This insurance does not apply to any liability, damages, loss, injury, demand, claim or "suit" arising out of or caused by, or allegedly caused by, asbestos either alone or in combination with other substances or factors.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Laff
SECRETARY

Edward F. Hill
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 18

LC 21 01 06 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

SILICA EXCLUSION ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART
GARAGE COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
MOTOR TRUCK CARGO COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRINTERS LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
SPECIAL PROTECTIVE AND HIGHWAY LIABILITY POLICY - NEW YORK
WAREHOUSEMEN'S LIABILITY COVERAGE PART

This insurance does not apply to any liability, damages, loss, injury, demand, claim or "suit" any part of which is caused by, or allegedly caused by, silica in any form or any substance containing silica, either alone or in combination with other substances or factors, whether included in a product or otherwise.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lagg
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 19

LC 21 02 06 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

DISCRIMINATION EXCLUSION

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART

This insurance does not apply to:

Damages arising out of unlawful discrimination.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Fay
SECRETARY

Edward F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 20

LC 21 04 06 '05

Page 1 of 1

WAIVER OF TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

SCHEDULE

Name Of Person Or Organization: Any person or organization with whom you have agreed in writing to waive any right of recovery prior to a loss

Information required to complete this Schedule, if not shown above, will be shown in the Declarations.

The following is added to Paragraph B. Transfer Of Rights Of Recovery Against Others To Us of Section IV - Conditions:

We waive any right of recovery we may have against the person or organization shown in the Schedule above because of payments we make for injury or damage arising out of your ongoing operations or "your work" done under a contract with that person or organization and included in the "products-completed operations hazard". This waiver applies only to the person or organization shown in the Schedule above.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter P. J. J.
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 21

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCESS PROVISION - CONSOLIDATED (WRAP-UP) INSURANCE PROGRAM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Paragraph b. of Condition 4. Other Insurance is deleted and replaced by:

b. Excess Insurance

This insurance is excess over:

- (1) Any of the other insurance, whether primary, excess, contingent or on any other basis:
 - (a) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";
 - (b) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;
 - (c) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or
 - (d) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I - Coverage A - Bodily Injury And Property Damage Liability.
- (2) Any primary or excess insurance available to you through a Consolidated (Wrap-Up) Insurance Program.
- (3) Any other primary insurance available to you covering liability for damages arising out of the premises or operations for which you have been added as an additional insured by attachment of an endorsement.

When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (1) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (2) The total of all deductible and self-insured amounts under all that other insurance.

LM 00042

We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lapp
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 22

LN 24 02 06 05

Page 2 of 2

Policy Number: TB2-651-287492-029
Issued by:

Endorsement Number: 23
Endorsement Effective Date:

THE ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NON-CUMULATION OF LIABILITY
(SAME OCCURRENCE)

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

1. The following is added to paragraph 4. of the Limits of Insurance Section:

If one "occurrence" causes "personal and advertising injury" to which this policy applies and to which one or more prior and/or future liability policy(ies) issued to you by us also applies, then this policy's Personal and Advertising Injury Limit will be reduced by the amount of each payment made by us under the other policy(ies) because of such "occurrence".

2. The following is added to paragraph 5. of the Limits of Insurance Section:

If one "occurrence" causes "bodily injury" and/or "property damage" during the policy period and during the policy period of one or more prior and/or future liability policy(ies) issued to you by us, then this policy's Each Occurrence Limit will be reduced by the amount of each payment made by us under the other policy(ies) because of such "occurrence".

3. The final paragraph of the Limits of Insurance Section is replaced with the following:

The aggregate Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the aggregated Limits of Insurance. However, the Each Occurrence Limit is the most we will pay for damages and Medical Expenses because of all "bodily injury" and "property damage" arising out of any one "occurrence" and the Personal and Advertising Injury Limit is the most we will pay for damage because of all "personal and advertising injury" arising out of any one "occurrence", regardless of the length of the policy period.

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

COVERAGE TERRITORY REDEFINED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

1. Amended Definition - Coverage Territory

Paragraph c. of the definition of "coverage territory" in the DEFINITIONS section is replaced by the following:

c. Anywhere in the world, except:

- (1) Any country or jurisdiction which is subject to trade or other economic sanctions or embargo by the United States of America;
- (2) with respect to injury or damage arising out of your "foreign based operations". As used herein, "foreign based operations" means:
 - (a) construction, fabrication, erection or installation operations outside the territory described in a. above;
 - (b) the manufacturing, raising, or growing of goods or products or the rendering of services outside the territory described in a. above;
 - (c) the sale or distribution of goods or products manufactured, raised or grown or services rendered outside the territory described in a. above at or from locations outside the territory described in a. above;
 - (d) Any other operations performed at premises or property owned, rented or used by you which is outside the territory described in a. above, or your operations from such premises or property.

2. Investigation, Defense, Settlement - Foreign Claims or Suits.

The insured under our supervision shall investigate, defend or settle any claim or "suit" brought in any country where we are prevented by law in that country from carrying out this agreement.

We will reimburse the insured for the reasonable costs of such investigation and defense and, within the applicable limit of insurance, for the amount of any settlement made with our prior written consent.

3. Exchange Rates

All payments or reimbursements we make for damages because of judgments or settlements will be made in U.S. currency at the prevailing exchange rate at the time the insured became legally obligated to pay such sums. All payments or reimbursements we make for expenses under Supplementary Payments will be made in U.S. currency at the prevailing exchange rate at the time the expenses were incurred.

4. Other Insurance

- a. This provision applies only to the Commercial General Liability and Products/Completed Operations Liability Coverage Parts.
- b. This insurance is excess over any of other valid and collectible insurance available to the insured, whether primary, excess, contingent or on any other basis that is coverage required by law, regulation or other governmental authority in a part of the "coverage territory" that is outside the United States of America (including its territories and possessions), Puerto Rico or Canada.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter P. Lay
SECRETARY

Leone F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 24

LC 29 01 05 06

Page 2 of 2

LM 00046

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

BODILY INJURY REDEFINED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE FORM

The definition of "bodily injury" is deleted and replaced with:

"Bodily injury" means:

1. bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time;
and
2. mental anguish, shock or humiliation arising out of injury as defined in paragraph 1.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Laff
SECRETARY

Edward F. Laff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 25

LN 29 03 06 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADVERTISEMENT REDEFINED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE FORM

The definition of "advertisement" is deleted and replaced with:

"Advertisement" means a paid announcement that is broadcast or published in the print, broadcast or electronic media to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

- a. Announcements that are published include material placed on the Internet or on similar electronic mean of communication; and
- b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Legg
SECRETARY

Edward F. Keff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 26

LN 29 06 06 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY

The following sections modify the insurance provided under the Commercial General Liability Coverage Part:

**PER PROJECT AND PER LOCATION COMBINED AGGREGATE LIMITS - WITH OPTIONAL
CAPPED LIMITS ENDORSEMENT**

PER PROJECT AND PER LOCATION COMBINED AGGREGATE LIMITS COVERAGE

- A. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under COVERAGE A (SECTION I), and for all medical expenses caused by accidents under COVERAGE C (SECTION I), which can be attributed only to ongoing operations at a single construction project or a single "location":
1. A separate Designated General Aggregate Limit applies to each construction project and to each "location", and that limit is equal to the amount of the General Aggregate Limit shown in the Declarations.
 2. The Designated General Aggregate Limit is the most we will pay for the sum of all damages under COVERAGE A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard", and for medical expenses under COVERAGE C regardless of the number of:
 - a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits".
 3. Any payments made under COVERAGE A for damages or under COVERAGE C for medical expenses shall reduce the Designated General Aggregate Limit for that construction project or "location". Such payments shall not reduce the General Aggregate Limit shown in the Declarations nor shall they reduce any other Designated General Aggregate Limit for any other construction project or "location".
 4. The limits shown in the Declarations for Each Occurrence, Fire Damage and Medical Expense continue to apply. However, instead of being subject to the General Aggregate Limit shown in the Declarations, such limits will be subject to the applicable Designated General Aggregate Limit.
- B. For all sums which the insured becomes legally obligated to pay as damages caused by "occurrences" under COVERAGE A (SECTION I), and for all medical expenses caused by accidents under COVERAGE C (SECTION I), which cannot be attributed only to ongoing operations at a single construction project or "location":
1. Any payments made under COVERAGE A for damages or under COVERAGE C for medical expenses shall reduce the amount available under the General Aggregate Limit or the Products-Completed Operations Aggregate Limit, whichever is applicable; and
 2. Such payments shall not reduce any Designated General Aggregate Limit.

- C. When coverage for liability arising out of the "products-completed operations hazard" is provided, any payments for damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard" will reduce the Products-Completed Operations Aggregate Limit, and not reduce the General Aggregate Limit nor the Designated General Aggregate Limit.
- D. If the applicable construction project has been abandoned, delayed, or abandoned and then restarted, or if the authorized contracting parties deviate from plans, blueprints, designs, specifications or timetables, the project will still be deemed to be the same construction project.
- E. For the purposes of this endorsement, the Definitions Section is amended by the addition of the following definition:
- "Location" means any premise that you occupy for permanent operations as part of your business, but does not include any premises at which you are performing operations as part of a construction project. All premises involving the same or connecting lots, or premises whose connection is interrupted only by a street, roadway, waterway or right-of-way of a railroad shall be considered a single "location".
- F. The provisions of Limits Of Insurance (SECTION III) not otherwise modified by this endorsement shall continue to apply as stipulated.

PER PROJECT AND PER LOCATION COMBINED AGGREGATE LIMITS - CAPPED LIMITS

- ☒ If this box is checked, the Per Project and Per Location Aggregate limits as provided above in will be capped at \$ 10,000,000.
- A. The Project and Location Aggregate Limit shown here is the most we will pay for the sum of all damages caused by "occurrences" under COVERAGE A (SECTION I) and all medical expenses caused by accidents under COVERAGE C (SECTION I) which can be attributed only to ongoing operations at a single construction project or a single "location", regardless of the number of construction projects, locations, "occurrences" or accidents.
- B. Each Designated General Aggregate Limit is subject to the Project and Location Aggregate Limit.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$
 Effective Date Expiration Date
 For attachment to Policy No. TB2-651-287492-029
 Audit Basis

Issued To

Dexter R. Long *Edward F. Hoff*
 SECRETARY PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 27

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NOTICE OF OCCURRENCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE FORM
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE FORM
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE FORM

For purposes of subparagraph a. of Paragraph 2. of the CONDITION SECTION, you refers to an "executive officer" of the Named Insured or to the "employee" designated by the insured to give us notice.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Andir Basis

Issued To

Dexter R. Lipp
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 28

LC 99 01 06 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

KNOWLEDGE OF OCCURRENCE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL LIABILITY UMBRELLA COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

Knowledge of an "occurrence" by your agent, servant or "employee" will not in itself constitute knowledge by you unless your "executive officer" or "employee" or other third party designated by you to notify us of "occurrences" has knowledge of the "occurrence".

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Legg
SECRETARY

Edward F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 29

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

UNINTENTIONAL FAILURE TO DISCLOSE

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL LIABILITY UMBRELLA COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

Unintentional failure of the named insured to disclose all hazards existing at the inception of this policy shall not be a basis for denial of any coverage afforded by this policy.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TR2-651-287492-029

Audit Basis

Issued To

Dexter E. Laff
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 30

LC 99 03 06 07

Page 1 of 1

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

PREMIUM RESPONSIBILITY ENDORSEMENT

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

Paragraph E. PREMIUMS of the COMMON POLICY CONDITIONS is deleted and replaced by the following:

1. Each Named Insured is jointly and severally liable for all premiums due under this policy and for any other financial obligations of any Named Insured to us arising out of any agreements contained in this policy.
2. The first Named Insured will be the payee for any return premiums we pay.

This endorsement is executed by the LIBERTY MUTUAL FIDELITY INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lipp
SECRETARY

Edward F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 31

LN 99 04 06 05

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

CAP ON LOSSES FROM CERTIFIED ACTS OF TERRORISM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

If aggregate insured losses attributable to terrorist acts certified under the federal Terrorism Risk Insurance Act exceed \$100 billion in a Program Year (January 1 through December 31) and we have met our insurer deductible under the Terrorism Risk Insurance Act, we shall not be liable for the payment of any portion of the amount of such losses that exceeds \$100 billion, and in such case insured losses up to that amount are subject to pro rata allocation in accordance with procedures established by the Secretary of the Treasury.

"Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:

1. The act resulted in insured losses in excess of \$5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act; and
2. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Laff
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 33

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

EXCLUSION OF PUNITIVE DAMAGES RELATED TO A CERTIFIED ACT OF TERRORISM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

A. The following exclusion is added:

This insurance does not apply to:

TERRORISM PUNITIVE DAMAGES

Damages arising, directly or indirectly, out of a "certified act of terrorism" that are awarded as punitive damages.

B. The following definition is added:

"Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:

1. The act resulted in insured losses in excess of \$5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act; and

2. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter P. Jay
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 34

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ARKANSAS EXCLUSION OF PUNITIVE DAMAGES RELATED TO A CERTIFIED ACT OF TERRORISM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

A. The following exclusion is added:

This insurance does not apply to:

TERRORISM PUNITIVE DAMAGES

Damages arising, directly or indirectly, out of a "certified act of terrorism" that are awarded as "punitive damages".

B. The following definitions are added:

1. "Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:

- a. The act resulted in insured losses in excess of \$5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act; and

b. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

2. "Punitive damages" means damages that may be imposed to punish a wrongdoer and to deter others from similar conduct.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-237492-029

Audit Basis

Issued To

Dexter R. Laff
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 35

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ALASKA EXCLUSION OF PUNITIVE DAMAGES RELATED TO A CERTIFIED ACT OF TERRORISM

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
LIQUOR LIABILITY COVERAGE PART
OWNERS AND CONTRACTORS PROTECTIVE LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART
RAILROAD PROTECTIVE LIABILITY COVERAGE PART
UNDERGROUND STORAGE TANK POLICY

A. The following exclusion is added:

This insurance does not apply to:

TERRORISM PUNITIVE DAMAGES

Damages arising out of a "certified act of terrorism" that are awarded as punitive damages.

B. The following definition is added:

"Certified act of terrorism" means an act that is certified by the Secretary of the Treasury, in concurrence with the Secretary of State and the Attorney General of the United States, to be an act of terrorism pursuant to the federal Terrorism Risk Insurance Act. The criteria contained in the Terrorism Risk Insurance Act for a "certified act of terrorism" include the following:

1. The act resulted in insured losses in excess of \$5 million in the aggregate, attributable to all types of insurance subject to the Terrorism Risk Insurance Act; and
2. The act is a violent act or an act that is dangerous to human life, property or infrastructure and is committed by an individual or individuals as part of an effort to coerce the civilian population of the United States or to influence the policy or affect the conduct of the United States Government by coercion.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter R. Lipp
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 36

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NORTH CAROLINA CHANGES – CANCELLATION AND NONRENEWAL

This endorsement modifies insurance provided under the following:

CAPITAL ASSETS PROGRAM (OUTPUT POLICY) COVERAGE PART
COMMERCIAL GENERAL LIABILITY COVERAGE PART
COMMERCIAL INLAND MARINE COVERAGE PART
COMMERCIAL LIABILITY UMBRELLA COVERAGE PART
COMMERCIAL PROPERTY COVERAGE PART
CRIME AND FIDELITY COVERAGE PART
EMPLOYMENT-RELATED PRACTICES LIABILITY COVERAGE PART
EQUIPMENT BREAKDOWN COVERAGE PART
FARM COVERAGE PART
FARM UMBRELLA LIABILITY POLICY
LIQUOR LIABILITY COVERAGE PART
MEDICAL PROFESSIONAL LIABILITY COVERAGE PART
POLLUTION LIABILITY COVERAGE PART
PRODUCTS/COMPLETED OPERATIONS LIABILITY COVERAGE PART

A. Paragraph 2. of the Cancellation Common Policy Condition is replaced by the following:

2. Cancellation Requirements

a. Policies In Effect Less Than 60 Days

If this policy has been in effect for less than 60 days, we may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:

- (1) 15 days before the effective date of cancellation if we cancel for nonpayment of premium; or
- (2) 30 days before the effective date of cancellation if we cancel for any other reason.

b. Policies In Effect More Than 60 Days

If this policy has been in effect for 60 days or more, or is a renewal of a policy we issued, we may cancel this policy prior to the:

- (1) Expiration of the policy term; or
- (2) Anniversary date,
stated in the policy only for one or more of the following reasons:
(a) Nonpayment of premium;

- (b) An act or omission by the insured or his or her representative that constitutes material misrepresentation or nondisclosure of a material fact in obtaining this policy, continuing this policy or presenting a claim under this policy;
- (c) Increased hazard or material change in the risk assumed that could not have been reasonably contemplated by the parties at the time of assumption of the risk;
- (d) Substantial breach of contractual duties, conditions or warranties that materially affects the insurability of the risk;
- (e) A fraudulent act against us by the insured or his or her representative that materially affects the insurability of the risk;
- (f) Willful failure by the insured or his or her representative to institute reasonable loss control measures that materially affect the insurability of the risk after written notice by us;

(g) Loss of facultative reinsurance, or loss of or substantial changes in applicable reinsurance as provided in G.S. 58-41-30;

(h) Conviction of the insured of a crime arising out of acts that materially affect the insurability of the risk;

(i) A determination by the Commissioner of Insurance that the continuation of the policy would place us in violation of the laws of North Carolina; or

(j) You fail to meet the requirements contained in our corporate charter, articles of incorporation or by-laws when we are a company organized for the sole purpose of providing members of an organization with insurance coverage in North Carolina.

We will mail or deliver written notice of cancellation to the first Named Insured at least:

(i) 15 days before the effective date of cancellation if we cancel for nonpayment of premium; or

(ii) 30 days before the effective date of cancellation if we cancel for any other reason.

c. Cancellation for nonpayment of premium will not become effective if you pay the premium amount due before the effective date of cancellation.

d. We may also cancel this policy for any reason not stated above provided we obtain your prior written consent.

B. The following provisions are added and supersede any other provisions to the contrary:

1. Nonrenewal

a. If we elect not to renew this policy, we will mail or deliver to the first Named Insured shown in the Declarations written notice of nonrenewal at least 45 days prior to the:

(1) Expiration of the policy if this policy has been written for one year or less; or

(2) Anniversary date of the policy if this policy has been written for more than one year or for an indefinite term.

b. We need not mail or deliver the notice of nonrenewal if you have:

(1) Insured property covered under this policy, under any other insurance policy;

(2) Accepted replacement coverage; or

(3) Requested or agreed to nonrenewal of this policy.

c. If notice is mailed, proof of mailing will be sufficient proof of notice.

2. The written notice of cancellation or nonrenewal will:

a. Be mailed or delivered to the first Named Insured and any designated mortgagee or loss payee at their addresses shown in the policy, or if not indicated in the policy, at their last known addresses; and

b. State the reason or reasons for cancellation or nonrenewal.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$

Effective Date

Expiration Date

For attachment to Policy No.

TB2-651-287492-029

Audit Basis

Issued To

Dexter P. Long
SECRETARY

Edward F. Hoff
PRESIDENT

Countersigned by

Authorized Representative

Issued

Sales Office and No.

End. Serial No. 37

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

ADDITIONAL INSURED – OWNERS, LESSEES OR CONTRACTORS – COMPLETED OPERATIONS

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

SCHEDULE

Name Of Additional Insured Person(s) Or Organization(s):	Location And Description Of Completed Operations
Any person or organization when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy.	
Information required to complete this Schedule, if not shown above, will be shown in the Declarations.	

Section II – Who Is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury" or "property damage" caused, in whole or in part, by "your work" at the location designated and described in the schedule of this endorsement performed for that additional insured and included in the "products-completed operations hazard".

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$ NPC
Effective Date 07/12/2010 Expiration Date 09/30/2010
For attachment to Policy No. TB2-651-287492-029
Audit Basis 1

Issued To Precision Walls Inc.
and as per Endorsement 1

Dexter R. Jay
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued
ks 7/27/10

Sales Office and No.
Duluth, GA 0505

End. Serial No. 38

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

NON-OWNED WATERCRAFT AMENDED

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART
EXCESS COMMERCIAL GENERAL LIABILITY COVERAGE PART

Exclusion g. of Section 1, Coverage A. is amended as follows:

A. Subparagraph (2) is deleted and replaced by the following:

- (2) A watercraft you do not own that is:
 - (a) Less than 50 feet long; and
 - (b) Not being used to carry persons or property for a charge.

B. The following exception is added:

This exclusion does not apply to:

"Bodily injury" or "property damage" arising out of the operation of drilling rigs, used over water, while they are:

- (a) in a fixed position; or
- (b) drilling.

This exception does not apply to "bodily injury" or "property damage" arising out of the operation of a drilling rig(s) while the drilling rig(s) is not fixed to the ocean floor.

This endorsement is executed by the LIBERTY MUTUAL FIRE INSURANCE COMPANY

Premium \$ NPC

Effective Date 08/06/2010 Expiration Date 09/30/2010

For attachment to Policy No. TB2-651-287492-029

Audit Basis 1

Issued To Precision Walls Inc.
and as per Endorsement 1

Dexter R. Felt
SECRETARY

Edward F. Kelly
PRESIDENT

Countersigned by

Authorized Representative

Issued
on 8/24/10

Sales Office and No.
Duluth, GA 0505

End. Serial No. 39

LN 04 01 06 05

AMENDATORY ENDORSEMENT

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

It is agreed that the Commercial General Liability Declarations is amended in part to read as follows:

DAMAGE TO PREMISES RENTED TO YOU LIMIT

\$ 500,000 Any one Premises

This endorsement is executed by the LIBERTY MUTUAL INSURANCE COMPANY

Premium \$ NPC :

Effective Date 08/10/2010 Expiration Date 09/30/2010

For attachment to Policy No. TB2-651-287492-029.

Audit Basis 1

Issued To Precision Walls Inc.
and as per Endorsement 1

Dexter R. Legg
SECRETARY

Charles F. Keff
PRESIDENT

Counterigned by _____
Authorized Representative

Issued
on 8/24/10

Sales Office and No.
Duluth, GA 0505

End. Serial No. 40

COMMON POLICY CONDITIONS

All Coverage Parts included in this policy are subject to the following conditions.

A. Cancellation

1. The first Named Insured shown in the Declarations may cancel this policy by mailing or delivering to us advance written notice of cancellation.
2. We may cancel this policy by mailing or delivering to the first Named Insured written notice of cancellation at least:
 - a. 10 days before the effective date of cancellation if we cancel for nonpayment of premium; or
 - b. 30 days before the effective date of cancellation if we cancel for any other reason.
3. We will mail or deliver our notice to the first Named Insured's last mailing address known to us.
4. Notice of cancellation will state the effective date of cancellation. The policy period will end on that date.
5. If this policy is cancelled, we will send the first Named Insured any premium refund due. If we cancel, the refund will be pro rata. If the first Named Insured cancels, the refund may be less than pro rata. The cancellation will be effective even if we have not made or offered a refund.
6. If notice is mailed, proof of mailing will be sufficient proof of notice.

B. Changes

This policy contains all the agreements between you and us concerning the insurance afforded. The first Named Insured shown in the Declarations is authorized to make changes in the terms of this policy with our consent. This policy's terms can be amended or waived only by endorsement issued by us and made a part of this policy.

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

D. Inspections And Surveys

1. We have the right to:
 - a. Make inspections and surveys at any time;

- b. Give you reports on the conditions we find; and
- c. Recommend changes.

2. We are not obligated to make any inspections, surveys, reports or recommendations and any such actions we do undertake relate only to insurability and the premiums to be charged. We do not make safety inspections. We do not undertake to perform the duty of any person or organization to provide for the health or safety of workers or the public. And we do not warrant that conditions:
 - a. Are safe or healthful; or
 - b. Comply with laws, regulations, codes or standards.

3. Paragraphs 1. and 2. of this condition apply not only to us, but also to any rating, advisory, rate service or similar organization which makes insurance inspections, surveys, reports or recommendations.

4. Paragraph 2. of this condition does not apply to any inspections, surveys, reports or recommendations we may make relative to certification, under state or municipal statutes, ordinances or regulations, of boilers, pressure vessels or elevators.

E. Premiums

The first Named Insured shown in the Declarations:

1. Is responsible for the payment of all premiums; and
2. Will be the payee for any return premiums we pay.

F. Transfer Of Your Rights And Duties Under This Policy

Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured.

If you die, your rights and duties will be transferred to your legal representative but only while acting within the scope of duties as your legal representative. Until your legal representative is appointed, anyone having proper temporary custody of your property will have your rights and duties but only with respect to that property.

COMMERCIAL GENERAL LIABILITY COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations, and any other person or organization qualifying as a Named Insured under this policy. The words "we", "us" and "our" refer to the company providing this insurance.

The word "insured" means any person or organization qualifying as such under Section II - Who Is An Insured.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V - Definitions.

SECTION I - COVERAGES

COVERAGE A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply. We may, at our discretion, investigate any "occurrence" and settle any claim or "suit" that may result. But:

- (1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and
- (2) Our right and duty to defend ends when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

- b. This insurance applies to "bodily injury" and "property damage" only if:

- (1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory";
- (2) The "bodily injury" or "property damage" occurs during the policy period; and
- (3) Prior to the policy period, no insured listed under Paragraph 1. of Section II - Who Is An Insured and no "employee" authorized by you to give or receive notice of an "occurrence" or claim, knew that the "bodily injury" or "property damage" had occurred, in whole or in part. If such a listed insured or authorized "employee" knew, prior to the policy period, that the "bodily injury" or "property damage" occurred, then any continuation, change or resumption of such "bodily injury" or "property damage" during or after the policy period will be deemed to have been known prior to the policy period.

- c. "Bodily injury" or "property damage" which occurs during the policy period and was not, prior to the policy period, known to have occurred by any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim, includes any continuation, change or resumption of that "bodily injury" or "property damage" after the end of the policy period.

- d. "Bodily injury" or "property damage" will be deemed to have been known to have occurred at the earliest time when any insured listed under Paragraph 1. of Section II - Who Is An Insured or any "employee" authorized by you to give or receive notice of an "occurrence" or claim:

- (1) Reports all, or any part, of the "bodily injury" or "property damage" to us or any other insurer;
- (2) Receives a written or verbal demand or claim for damages because of the "bodily injury" or "property damage"; or
- (3) Becomes aware by any other means that "bodily injury" or "property damage" has occurred or has begun to occur.

- e. Damages because of "bodily injury" include damages claimed by any person or organization for care, loss of services or death resulting at any time from the "bodily injury".

2. Exclusions

This insurance does not apply to:

a. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the insured. This exclusion does not apply to "bodily injury" resulting from the use of reasonable force to protect persons or property.

b. Contractual Liability

"Bodily injury" or "property damage" for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:

- (1) That the insured would have in the absence of the contract or agreement; or
- (2) Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement. Solely for the purposes of liability assumed in an "insured contract", reasonable attorney fees and necessary litigation expenses incurred by or for a party other than an insured are deemed to be damages because of "bodily injury" or "property damage", provided:
 - (a) Liability to such party for, or for the cost of, that party's defense has also been assumed in the same "insured contract"; and
 - (b) Such attorney fees and litigation expenses are for defense of that party against a civil or alternative dispute resolution proceeding in which damages to which this insurance applies are alleged.

c. Liquor Liability

"Bodily injury" or "property damage" for which any insured may be held liable by reason of:

- (1) Causing or contributing to the intoxication of any person;
- (2) The furnishing of alcoholic beverages to a person under the legal drinking age or under the influence of alcohol; or
- (3) Any statute, ordinance or regulation relating to the sale, gift, distribution or use of alcoholic beverages.

This exclusion applies only if you are in the business of manufacturing, distributing, selling, serving or furnishing alcoholic beverages.

d. Workers' Compensation And Similar Laws

Any obligation of the insured under a workers' compensation, disability benefits or unemployment compensation law or any similar law.

e. Employer's Liability

"Bodily injury" to:

- (1) An "employee" of the insured arising out of and in the course of:
 - (a) Employment by the insured; or
 - (b) Performing duties related to the conduct of the insured's business; or
- (2) The spouse, child, parent, brother or sister of that "employee" as a consequence of Paragraph (1) above.

This exclusion applies whether the insured may be liable as an employer or in any other capacity and to any obligation to share damages with or repay someone else who must pay damages because of the injury.

This exclusion does not apply to liability assumed by the insured under an "insured contract".

f. Pollution

- (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
 - (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
 - (i) "Bodily injury" if sustained within a building and caused by smoke, fumes, vapor or soot produced by or originating from equipment that is used to heat, cool or dehumidify the building, or equipment that is used to heat water for personal use, by the building's occupants or their guests;
 - (ii) "Bodily injury" or "property damage" for which you may be held liable, if you are a contractor and the owner or lessee of such premises, site or location has been added to your policy as an additional insured with respect to your ongoing operations performed for that additional insured at that premises, site or location and such premises, site or location is not and never was owned or occupied by, or rented or loaned to, any insured, other than that additional insured; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire";
 - (b) At or from any premises, site or location which is or was at any time used by or for any insured or others for the handling, storage, disposal, processing or treatment of waste;
 - (c) Which are or were at any time transported, handled, stored, treated, disposed of, or processed as waste by or for:
 - (i) Any insured; or
 - (ii) Any person or organization for whom you may be legally responsible; or
 - (d) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the "pollutants" are brought on or to the premises, site or location in connection with such operations by such insured, contractor or subcontractor. However, this subparagraph does not apply to:
 - (i) "Bodily injury" or "property damage" arising out of the escape of fuels, lubricants or other operating fluids which are needed to perform the normal electrical, hydraulic or mechanical functions necessary for the operation of "mobile equipment" or its parts, if such fuels, lubricants or other operating fluids escape from a vehicle part designed to hold, store or receive them. This exception does not apply if the "bodily injury" or "property damage" arises out of the intentional discharge, dispersal or release of the fuels, lubricants or other operating fluids, or if such fuels, lubricants or other operating fluids are brought on or to the premises, site or location with the intent that they be discharged, dispersed or released as part of the operations being performed by such insured, contractor or subcontractor;
 - (ii) "Bodily injury" or "property damage" sustained within a building and caused by the release of gases, fumes or vapors from materials brought into that building in connection with operations being performed by you or on your behalf by a contractor or subcontractor; or
 - (iii) "Bodily injury" or "property damage" arising out of heat, smoke or fumes from a "hostile fire".
 - (e) At or from any premises, site or location on which any insured or any contractors or subcontractors working directly or indirectly on any insured's behalf are performing operations if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants".

(2) Any loss, cost or expense arising out of any:

- (a) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (b) Claim or "suit" by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

However, this paragraph does not apply to liability for damages because of "property damage" that the insured would have in the absence of such request, demand, order or statutory or regulatory requirement, or such claim or "suit" by or on behalf of a governmental authority.

g. Aircraft, Auto Or Watercraft

"Bodily injury" or "property damage" arising out of the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft owned or operated by or rented or loaned to any insured. Use includes operation and "loading or unloading".

This exclusion applies even if the claims against any insured allege negligence or other wrongdoing in the supervision, hiring, employment, training or monitoring of others by that insured, if the "occurrence" which caused the "bodily injury" or "property damage" involved the ownership, maintenance, use or entrustment to others of any aircraft, "auto" or watercraft that is owned or operated by or rented or loaned to any insured.

This exclusion does not apply to:

- (1) A watercraft while ashore on premises you own or rent;
- (2) A watercraft you do not own that is:
 - (a) Less than 26 feet long; and
 - (b) Not being used to carry persons or property for a charge;
- (3) Parking an "auto" on, or on the ways next to, premises you own or rent, provided the "auto" is not owned by or rented or loaned to you or the insured;
- (4) Liability assumed under any "insured contract" for the ownership, maintenance or use of aircraft or watercraft; or

(5) "Bodily injury" or "property damage" arising out of:

- (a) The operation of machinery or equipment that is attached to, or part of, a land vehicle that would qualify under the definition of "mobile equipment" if it were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged; or
- (b) the operation of any of the machinery or equipment listed in Paragraph f.(2) or f.(3) of the definition of "mobile equipment".

h. Mobile Equipment

"Bodily injury" or "property damage" arising out of:

- (1) The transportation of "mobile equipment" by an "auto" owned or operated by or rented or loaned to any insured; or
- (2) The use of "mobile equipment" in, or while in practice for, or while being prepared for, any prearranged racing, speed, demolition, or stunting activity.

i. War

"Bodily injury" or "property damage", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or
- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

j. Damage To Property

"Property damage" to:

- (1) Property you own, rent, or occupy, including any costs or expenses incurred by you, or any other person, organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property;
- (2) Premises you sell, give away or abandon, if the "property damage" arises out of any part of those premises;
- (3) Property loaned to you;
- (4) Personal property in the care, custody or control of the insured;

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (1), (3) and (4) of this exclusion do not apply to "property damage" (other than damage by fire) to premises, including the contents of such premises, rented to you for a period of 7 or fewer consecutive days. A separate limit of insurance applies to Damage To Premises Rented To You as described in Section III – Limits Of Insurance.

Paragraph (2) of this exclusion does not apply if the premises are "your work" and were never occupied, rented or held for rental by you.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

k. Damage To Your Product

"Property damage" to "your product" arising out of it or any part of it.

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

n. Recall Of Products, Work Or Impaired Property

Damages claimed for any loss, cost or expense incurred by you or others for the loss of use, withdrawal, recall, inspection, repair, replacement, adjustment, removal or disposal of:

- (1) "Your product";
- (2) "Your work"; or
- (3) "Impaired property";

if such product, work, or property is withdrawn or recalled from the market or from use by any person or organization because of a known or suspected defect, deficiency, inadequacy or dangerous condition in it.

o. Personal And Advertising Injury

"Bodily injury" arising out of "personal and advertising injury".

p. Electronic Data

Damages arising out of the loss of, loss of use of, damage to, corruption of, inability to access, or inability to manipulate electronic data.

As used in this exclusion, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

q. Distribution Of Material In Violation Of Statutes

"Bodily injury" or "property damage" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

Exclusions c. through n. do not apply to damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner. A separate limit of insurance applies to this coverage as described in Section III - Limits Of Insurance.

COVERAGE B PERSONAL AND ADVERTISING INJURY LIABILITY

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "personal and advertising injury" to which this insurance applies. We will have the right and duty to defend the insured against any "suit" seeking those damages. However, we will have no duty to defend the insured against any "suit" seeking damages for "personal and advertising injury" to which this insurance does not apply. We may, at our discretion, investigate any offense and settle any claim or "suit" that may result. But:

(1) The amount we will pay for damages is limited as described in Section III - Limits Of Insurance; and

(2) Our right and duty to defend end when we have used up the applicable limit of insurance in the payment of judgments or settlements under Coverages A or B or medical expenses under Coverage C.

No other obligation or liability to pay sums or perform acts or services is covered unless explicitly provided for under Supplementary Payments - Coverages A and B.

b. This insurance applies to "personal and advertising injury" caused by an offense arising out of your business but only if the offense was committed in the "coverage territory" during the policy period.

2. Exclusions

This insurance does not apply to:

a. Knowing Violation Of Rights Of Another

"Personal and advertising injury" caused by or at the direction of the insured with the knowledge that the act would violate the rights of another and would inflict "personal and advertising injury".

b. Material Published With Knowledge Of Falsity

"Personal and advertising injury" arising out of oral or written publication of material, if done by or at the direction of the insured with knowledge of its falsity.

c. Material Published Prior To Policy Period

"Personal and advertising injury" arising out of oral or written publication of material whose first publication took place before the beginning of the policy period.

d. Criminal Acts

"Personal and advertising injury" arising out of a criminal act committed by or at the direction of the insured.

e. Contractual Liability

"Personal and advertising injury" for which the insured has assumed liability in a contract or agreement. This exclusion does not apply to liability for damages that the insured would have in the absence of the contract or agreement.

f. Breach Of Contract

"Personal and advertising injury" arising out of a breach of contract, except an implied contract to use another's advertising idea in your "advertisement".

g. Quality Or Performance Of Goods - Failure To Conform To Statements

"Personal and advertising injury" arising out of the failure of goods, products or services to conform with any statement of quality or performance made in your "advertisement".

h. Wrong Description Of Prices

"Personal and advertising injury" arising out of the wrong description of the price of goods, products or services stated in your "advertisement".

i. Infringement Of Copyright, Patent, Trademark Or Trade Secret

"Personal and advertising injury" arising out of the infringement of copyright, patent, trademark, trade secret or other intellectual property rights. Under this exclusion, such other intellectual property rights do not include the use of another's advertising idea in your "advertisement".

However, this exclusion does not apply to infringement, in your "advertisement", of copyright, trade dress or slogan.

j. Insureds In Media And Internet Type Businesses

"Personal and advertising injury" committed by an insured whose business is:

- (1) Advertising, broadcasting, publishing or telecasting;
- (2) Designing or determining content of websites for others; or

- (3) An Internet search, access, content or service provider.

However, this exclusion does not apply to Paragraphs 14.a., b. and c. of "personal and advertising injury" under the Definitions Section.

For the purposes of this exclusion, the placing of frames, borders or links, or advertising, for you or others anywhere on the Internet, is not by itself, considered the business of advertising, broadcasting, publishing or telecasting.

k. Electronic Chatrooms Or Bulletin Boards

"Personal and advertising injury" arising out of an electronic chatroom or bulletin board the insured hosts, owns, or over which the insured exercises control.

l. Unauthorized Use Of Another's Name Or Product

"Personal and advertising injury" arising out of the unauthorized use of another's name or product in your e-mail address, domain name or metatag, or any other similar tactics to mislead another's potential customers.

m. Pollution

"Personal and advertising injury" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants" at any time.

n. Pollution-Related

Any loss, cost or expense arising out of any:

- (1) Request, demand, order or statutory or regulatory requirement that any insured or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of, "pollutants"; or
- (2) Claim or suit by or on behalf of a governmental authority for damages because of testing for, monitoring, cleaning up, removing, containing, treating, detoxifying or neutralizing, or in any way responding to, or assessing the effects of, "pollutants".

o. War

"Personal and advertising injury", however caused, arising, directly or indirectly, out of:

- (1) War, including undeclared or civil war;
- (2) Warlike action by a military force, including action in hindering or defending against an actual or expected attack, by any government, sovereign or other authority using military personnel or other agents; or

- (3) Insurrection, rebellion, revolution, usurped power, or action taken by governmental authority in hindering or defending against any of these.

p. Distribution Of Material In Violation Of Statutes

"Personal and advertising injury" arising directly or indirectly out of any action or omission that violates or is alleged to violate:

- (1) The Telephone Consumer Protection Act (TCPA), including any amendment of or addition to such law; or
- (2) The CAN-SPAM Act of 2003, including any amendment of or addition to such law; or
- (3) Any statute, ordinance or regulation, other than the TCPA or CAN-SPAM Act of 2003, that prohibits or limits the sending, transmitting, communicating or distribution of material or information.

COVERAGE C MEDICAL PAYMENTS

1. Insuring Agreement

- a. We will pay medical expenses as described below for "bodily injury" caused by an accident:

- (1) On premises you own or rent;
 - (2) On ways next to premises you own or rent; or
 - (3) Because of your operations;
- provided that:

- (a) The accident takes place in the "coverage territory" and during the policy period;
- (b) The expenses are incurred and reported to us within one year of the date of the accident; and
- (c) The injured person submits to examination, at our expense, by physicians of our choice as often as we reasonably require.

- b. We will make these payments regardless of fault. These payments will not exceed the applicable limit of insurance. We will pay reasonable expenses for:

- (1) First aid administered at the time of an accident;
- (2) Necessary medical, surgical, x-ray and dental services, including prosthetic devices; and
- (3) Necessary ambulance, hospital, professional nursing and funeral services.

2. Exclusions

We will not pay expenses for "bodily injury":

a. Any Insured

To any insured, except "volunteer workers".

b. Hired Person

To a person hired to do work for or on behalf of any insured or a tenant of any insured.

c. Injury On Normally Occupied Premises

To a person injured on that part of premises you own or rent that the person normally occupies.

d. Workers Compensation And Similar Laws

To a person, whether or not an "employee" of any insured, if benefits for the "bodily injury" are payable or must be provided under a workers' compensation or disability benefits law or a similar law.

e. Athletics Activities

To a person injured while practicing, instructing or participating in any physical exercises or games, sports, or athletic contests.

f. Products-Completed Operations Hazard

Included within the "products-completed operations hazard".

g. Coverage A Exclusions

Excluded under Coverage A.

SUPPLEMENTARY PAYMENTS - COVERAGES A AND B**1. We will pay, with respect to any claim we investigate or settle, or any "suit" against an insured we defend:**

- a. All expenses we incur.
- b. Up to \$250 for cost of bail bonds required because of accidents or traffic law violations arising out of the use of any vehicle to which the Bodily Injury Liability Coverage applies. We do not have to furnish these bonds.
- c. The cost of bonds to release attachments, but only for bond amounts within the applicable limit of insurance. We do not have to furnish these bonds.
- d. All reasonable expenses incurred by the insured at our request to assist us in the investigation or defense of the claim or "suit", including actual loss of earnings up to \$250 a day because of time off from work.
- e. All court costs taxed against the insured in the "suit". However, these payments do not include attorneys' fees or attorneys' expenses taxed against the insured.

f. Prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of insurance, we will not pay any prejudgment interest based on that period of time after the offer.

g. All interest on the full amount of any judgment that accrues after entry of the judgment and before we have paid, offered to pay, or deposited in court the part of the judgment that is within the applicable limit of insurance.

These payments will not reduce the limits of insurance.

2. If we defend an insured against a "suit" and an indemnitee of the insured is also named as a party to the "suit", we will defend that indemnitee if all of the following conditions are met:

- a. The "suit" against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an "insured contract";
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same "insured contract";
- d. The allegations in the "suit" and the information we know about the "occurrence" are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such "suit" and agree that we can assign the same counsel to defend the insured and the indemnitee; and
- f. The indemnitee:
 - (1) Agrees in writing to:
 - (a) Cooperate with us in the investigation, settlement or defense of the "suit";
 - (b) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the "suit";
 - (c) Notify any other insurer whose coverage is available to the indemnitee; and
 - (d) Cooperate with us with respect to coordinating other applicable insurance available to the indemnitee; and
 - (2) Provides us with written authorization to:
 - (a) Obtain records and other information related to the "suit"; and

(b) Conduct and control the defense of the indemnitee in such "suit".

So long as the above conditions are met, attorneys' fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments. Notwithstanding the provisions of Paragraph 2.b.(2) of Section I - Coverage A - Bodily Injury And Property Damage Liability, such payments will not be deemed to be damages for "bodily injury" and "property damage" and will not reduce the limits of insurance.

Our obligation to defend an insured's indemnitee and to pay for attorneys' fees and necessary litigation expenses as Supplementary Payments ends when we have used up the applicable limit of insurance in the payment of judgments or settlements or the conditions set forth above, or the terms of the agreement described in Paragraph f. above, are no longer met.

SECTION II - WHO IS AN INSURED

1. If you are designated in the Declarations as:

- a. An individual, you and your spouse are insureds, but only with respect to the conduct of a business of which you are the sole owner.
- b. A partnership or joint venture, you are an insured. Your members, your partners, and their spouses are also insureds, but only with respect to the conduct of your business.
- c. A limited liability company, you are an insured. Your members are also insureds, but only with respect to the conduct of your business. Your managers are insureds, but only with respect to their duties as your managers.
- d. An organization other than a partnership, joint venture or limited liability company, you are an insured. Your "executive officers" and directors are insureds, but only with respect to their duties as your officers or directors. Your stockholders are also insureds, but only with respect to their liability as stockholders.
- e. A trust, you are an insured. Your trustees are also insureds, but only with respect to their duties as trustees.

2. Each of the following is also an insured:

- a. Your "volunteer workers" only while performing duties related to the conduct of your business, or your "employees", other than either your "executive officers" (if you are an organization other than a partnership, joint venture or limited liability company) or your managers (if you are a limited liability company), but only for acts within the scope of their employment by you or while performing duties related to the conduct of your business. However, none of these "employees" or "volunteer workers" are insureds for:

(1) "Bodily injury" or "personal and advertising injury":

- (a) To you, to your partners or members (if you are a partnership or joint venture), to your members (if you are a limited liability company), to a co-"employee" while in the course of his or her employment or performing duties related to the conduct of your business, or to your other "volunteer workers" while performing duties related to the conduct of your business;
- (b) To the spouse, child, parent, brother or sister of that co-"employee" or "volunteer worker" as a consequence of Paragraph (1)(a) above;
- (c) For which there is any obligation to share damages with or repay someone else who must pay damages because of the injury described in Paragraphs (1)(a) or (b) above; or
- (d) Arising out of his or her providing or failing to provide professional health care services.

(2) "Property damage" to property:

- (a) Owned, occupied or used by,
- (b) Rented to, in the care, custody or control of, or over which physical control is being exercised for any purpose by you, any of your "employees", "volunteer workers", any partner or member (if you are a partnership or joint venture), or any member (if you are a limited liability company).

- b. Any person (other than your "employee" or "volunteer worker"), or any organization while acting as your real estate manager.
- c. Any person or organization having proper temporary custody of your property if you die, but only:
 - (1) With respect to liability arising out of the maintenance or use of that property; and
 - (2) Until your legal representative has been appointed.
- d. Your legal representative if you die, but only with respect to duties as such. That representative will have all your rights and duties under this Coverage Part.
- 3. Any organization you newly acquire or form, other than a partnership, joint venture or limited liability company, and over which you maintain ownership or majority interest, will qualify as a Named Insured if there is no other similar insurance available to that organization. However:
 - a. Coverage under this provision is afforded only until the 90th day after you acquire or form the organization or the end of the policy period, whichever is earlier;
 - b. Coverage A does not apply to "bodily injury" or "property damage" that occurred before you acquired or formed the organization; and
 - c. Coverage B does not apply to "personal and advertising injury" arising out of an offense committed before you acquired or formed the organization.

No person or organization is an insured with respect to the conduct of any current or past partnership, joint venture or limited liability company that is not shown as a Named Insured in the Declarations.

SECTION III - LIMITS OF INSURANCE

- 1. The Limits of Insurance shown in the Declarations and the rules below fix the most we will pay regardless of the number of:
 - a. Insureds;
 - b. Claims made or "suits" brought; or
 - c. Persons or organizations making claims or bringing "suits".
- 2. The General Aggregate Limit is the most we will pay for the sum of:
 - a. Medical expenses under Coverage C;
 - b. Damages under Coverage A, except damages because of "bodily injury" or "property damage" included in the "products-completed operations hazard"; and
 - c. Damages under Coverage B.

- 3. The Products-Completed Operations Aggregate Limit is the most we will pay under Coverage A for damages because of "bodily injury" and "property damage" included in the "products-completed operations hazard".
- 4. Subject to Paragraph 2. above, the Personal and Advertising Injury Limit is the most we will pay under Coverage B for the sum of all damages because of all "personal and advertising injury" sustained by any one person or organization.
- 5. Subject to Paragraph 2. or 3. above, whichever applies, the Each Occurrence Limit is the most we will pay for the sum of:
 - a. Damages under Coverage A; and
 - b. Medical expenses under Coverage C because of all "bodily injury" and "property damage" arising out of any one "occurrence".
- 6. Subject to Paragraph 5. above, the Damage To Premises Rented To You Limit is the most we will pay under Coverage A for damages because of "property damage" to any one premises, while rented to you, or in the case of damage by fire, while rented to you or temporarily occupied by you with permission of the owner.
- 7. Subject to Paragraph 5. above, the Medical Expense Limit is the most we will pay under Coverage C for all medical expenses because of "bodily injury" sustained by any one person.

The Limits of Insurance of this Coverage Part apply separately to each consecutive annual period and to any remaining period of less than 12 months, starting with the beginning of the policy period shown in the Declarations, unless the policy period is extended after issuance for an additional period of less than 12 months. In that case, the additional period will be deemed part of the last preceding period for purposes of determining the Limits of Insurance.

SECTION IV - COMMERCIAL GENERAL LIABILITY CONDITIONS

1. Bankruptcy

Bankruptcy or insolvency of the insured or of the insured's estate will not relieve us of our obligations under this Coverage Part.

2. Duties In The Event Of Occurrence, Offense, Claim Or Suit

- a. You must see to it that we are notified as soon as practicable of an "occurrence" or an offense which may result in a claim. To the extent possible, notice should include:
 - (1) How, when and where the "occurrence" or offense took place;
 - (2) The names and addresses of any injured persons and witnesses; and

- (3) The nature and location of any injury or damage arising out of the "occurrence" or offense.

b. If a claim is made or "suit" is brought against any insured, you must:

- (1) Immediately record the specifics of the claim or "suit" and the date received; and
- (2) Notify us as soon as practicable.

You must see to it that we receive written notice of the claim or "suit" as soon as practicable.

c. You and any other involved insured must:

- (1) Immediately send us copies of any demands, notices, summonses or legal papers received in connection with the claim or "suit";
- (2) Authorize us to obtain records and other information;
- (3) Cooperate with us in the investigation or settlement of the claim or defense against the "suit"; and
- (4) Assist us, upon our request, in the enforcement of any right against any person or organization which may be liable to the insured because of injury or damage to which this insurance may also apply.

d. No insured will, except at that insured's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our consent.

3. Legal Action Against Us

No person or organization has a right under this Coverage Part:

- a. To join us as a party or otherwise bring us into a "suit" asking for damages from an insured; or
- b. To sue us on this Coverage Part unless all of its terms have been fully complied with.

A person or organization may sue us to recover on an agreed settlement or on a final judgment against an insured; but we will not be liable for damages that are not payable under the terms of this Coverage Part or that are in excess of the applicable limit of insurance. An agreed settlement means a settlement and release of liability signed by us, the insured and the claimant or the claimant's legal representative.

4. Other Insurance

If other valid and collectible insurance is available to the insured for a loss we cover under Coverages A or B of this Coverage Part, our obligations are limited as follows:

a. Primary Insurance

This insurance is primary except when Paragraph b. below applies. If this insurance is primary, our obligations are not affected unless any of the other insurance is also primary. Then, we will share with all that other insurance by the method described in Paragraph c. below.

b. Excess Insurance

(1) This insurance is excess over:

- (a) Any of the other insurance, whether primary, excess, contingent or on any other basis:

- (i) That is Fire, Extended Coverage, Builder's Risk, Installation Risk or similar coverage for "your work";

- (ii) That is Fire insurance for premises rented to you or temporarily occupied by you with permission of the owner;

- (iii) That is insurance purchased by you to cover your liability as a tenant for "property damage" to premises rented to you or temporarily occupied by you with permission of the owner; or

- (iv) If the loss arises out of the maintenance or use of aircraft, "autos" or watercraft to the extent not subject to Exclusion g. of Section I - Coverage A - Bodily Injury And Property Damage Liability.

- (b) Any other primary insurance available to you covering liability for damages arising out of the premises or operations, or the products and completed operations, for which you have been added as an additional insured by attachment of an endorsement.

(2) When this insurance is excess, we will have no duty under Coverages A or B to defend the insured against any "suit" if any other insurer has a duty to defend the insured against that "suit". If no other insurer defends, we will undertake to do so, but we will be entitled to the insured's rights against all those other insurers.

- (3) When this insurance is excess over other insurance, we will pay only our share of the amount of the loss, if any, that exceeds the sum of:

- (a) The total amount that all such other insurance would pay for the loss in the absence of this insurance; and
- (b) The total of all deductible and self-insured amounts under all that other insurance.

- (4) We will share the remaining loss, if any, with any other insurance that is not described in this Excess Insurance provision and was not bought specifically to apply in excess of the Limits of Insurance shown in the Declarations of this Coverage Part.

c. Method Of Sharing

If all of the other insurance permits contribution by equal shares, we will follow this method also. Under this approach each insurer contributes equal amounts until it has paid its applicable limit of insurance or none of the loss remains, whichever comes first.

If any of the other insurance does not permit contribution by equal shares, we will contribute by limits. Under this method, each insurer's share is based on the ratio of its applicable limit of insurance to the total applicable limits of insurance of all insurers.

5. Premium Audit

- a. We will compute all premiums for this Coverage Part in accordance with our rules and rates.
- b. Premium shown in this Coverage Part as advance premium is a deposit premium only. At the close of each audit period we will compute the earned premium for that period and send notice to the first Named Insured. The due date for audit and retrospective premiums is the date shown as the due date on the bill. If the sum of the advance and audit premiums paid for the policy period is greater than the earned premium, we will return the excess to the first Named Insured.
- c. The first Named Insured must keep records of the information we need for premium computation, and send us copies at such times as we may request.

6. Representations

By accepting this policy, you agree:

- a. The statements in the Declarations are accurate and complete;
- b. Those statements are based upon representations you made to us; and

- c. We have issued this policy in reliance upon your representations.

7. Separation Of Insureds

Except with respect to the Limits of Insurance, and any rights or duties specifically assigned in this Coverage Part to the first Named Insured, this insurance applies:

- a. As if each Named Insured were the only Named Insured; and
- b. Separately to each insured against whom claim is made or "suit" is brought.

8. Transfer Of Rights Of Recovery Against Others To Us

If the insured has rights to recover all or part of any payment we have made under this Coverage Part, those rights are transferred to us. The insured must do nothing after loss to impair them. At our request, the insured will bring "suit" or transfer those rights to us and help us enforce them.

9. When We Do Not Renew

If we decide not to renew this Coverage Part, we will mail or deliver to the first Named Insured shown in the Declarations written notice of the nonrenewal not less than 30 days before the expiration date.

If notice is mailed, proof of mailing will be sufficient proof of notice.

SECTION V - DEFINITIONS

1. "Advertisement" means a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters. For the purposes of this definition:

- a. Notices that are published include material placed on the Internet or on similar electronic means of communication; and
- b. Regarding web-sites, only that part of a web-site that is about your goods, products or services for the purposes of attracting customers or supporters is considered an advertisement.

2. "Auto" means:

- a. A land motor vehicle, trailer or semitrailer designed for travel on public roads, including any attached machinery or equipment; or
- b. Any other land vehicle that is subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged.

However, "auto" does not include "mobile equipment".

3. "Bodily injury" means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.
4. "Coverage territory" means:
- The United States of America (including its territories and possessions), Puerto Rico and Canada;
 - International waters or airspace, but only if the injury or damage occurs in the course of travel or transportation between any places included in Paragraph a. above; or
 - All other parts of the world if the injury or damage arises out of:
 - Goods or products made or sold by you in the territory described in Paragraph a. above;
 - The activities of a person whose home is in the territory described in Paragraph a. above, but is away for a short time on your business; or
 - "Personal" and "advertising injury" offenses that take place through the Internet or similar electronic means of communication
- provided the insured's responsibility to pay damages is determined in a "suit" on the merits, in the territory described in Paragraph a. above or in a settlement we agree to.
5. "Employee" includes a "leased worker". "Employee" does not include a "temporary worker".
6. "Executive officer" means a person holding any of the officer positions created by your charter, constitution, by-laws or any other similar governing document.
7. "Hostile fire" means one which becomes uncontrollable or breaks out from where it was intended to be.
8. "Impaired property" means tangible property, other than "your product" or "your work", that cannot be used or is less useful because:
- It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
 - You have failed to fulfill the terms of a contract or agreement;
- if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

9. "Insured contract" means:

- A contract for a lease of premises. However, that portion of the contract for a lease of premises that indemnifies any person or organization for damage by fire to premises while rented to you or temporarily occupied by you with permission of the owner is not an "insured contract";
 - A sidetrack agreement;
 - Any easement or license agreement, except in connection with construction or demolition operations on or within 50 feet of a railroad;
 - An obligation, as required by ordinance, to indemnify a municipality, except in connection with work for a municipality;
 - An elevator maintenance agreement;
 - That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for "bodily injury" or "property damage" to a third person or organization. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement.
- Paragraph f. does not include that part of any contract or agreement:
- That indemnifies a railroad for "bodily injury" or "property damage" arising out of construction or demolition operations, within 50 feet of any railroad property and affecting any railroad bridge or trestle, tracks, roadbeds, tunnel, underpass or crossing;
 - That indemnifies an architect, engineer or surveyor for injury or damage arising out of:
 - Preparing, approving, or failing to prepare or approve, maps, shop drawings, opinions, reports, surveys, field orders, change orders or drawings and specifications; or
 - Giving directions or instructions, or failing to give them, if that is the primary cause of the injury or damage; or
 - Under which the insured, if an architect, engineer or surveyor, assumes liability for an injury or damage arising out of the insured's rendering or failure to render professional services, including those listed in (2) above and supervisory, inspection, architectural or engineering activities.

10. "Leased worker" means a person leased to you by a labor leasing firm under an agreement between you and the labor leasing firm, to perform duties related to the conduct of your business. "Leased worker" does not include a "temporary worker".

11. "Loading or unloading" means the handling of property:

- a. After it is moved from the place where it is accepted for movement into or onto an aircraft, watercraft or "auto";
- b. While it is in or on an aircraft, watercraft or "auto"; or
- c. While it is being moved from an aircraft, watercraft or "auto" to the place where it is finally delivered;

but "loading or unloading" does not include the movement of property by means of a mechanical device, other than a hand truck, that is not attached to the aircraft, watercraft or "auto".

12. "Mobile equipment" means any of the following types of land vehicles, including any attached machinery or equipment:

- a. Bulldozers, farm machinery, forklifts and other vehicles designed for use principally off public roads;
- b. Vehicles maintained for use solely on or next to premises you own or rent;
- c. Vehicles that travel on crawler treads;
- d. Vehicles, whether self-propelled or not, maintained primarily to provide mobility to permanently mounted:
 - (1) Power cranes, shovels, loaders, diggers or drills; or
 - (2) Road construction or resurfacing equipment such as graders, scrapers or rollers;
- e. Vehicles not described in Paragraph a., b., c. or d. above that are not self-propelled and are maintained primarily to provide mobility to permanently attached equipment of the following types:
 - (1) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment; or
 - (2) Cherry pickers and similar devices used to raise or lower workers;
- f. Vehicles not described in Paragraph a., b., c. or d. above maintained primarily for purposes other than the transportation of persons or cargo.

However, self-propelled vehicles with the following types of permanently attached equipment are not "mobile equipment" but will be considered "autos":

(1) Equipment designed primarily for:

- (a) Snow removal;
 - (b) Road maintenance, but not construction or resurfacing; or
 - (c) Street cleaning;
- (2) Cherry pickers and similar devices mounted on automobile or truck chassis and used to raise or lower workers; and
- (3) Air compressors, pumps and generators, including spraying, welding, building cleaning, geophysical exploration, lighting and well servicing equipment.

However, "mobile equipment" does not include any land vehicles that are subject to a compulsory or financial responsibility law or other motor vehicle insurance law in the state where it is licensed or principally garaged. Land vehicles subject to a compulsory or financial responsibility law or other motor vehicle insurance law are considered "autos".

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

14. "Personal and advertising injury" means injury, including consequential "bodily injury", arising out of one or more of the following offenses:

- a. False arrest, detention or imprisonment;
- b. Malicious prosecution;
- c. The wrongful eviction from, wrongful entry into, or invasion of the right of private occupancy of a room, dwelling or premises that a person occupies, committed by or on behalf of its owner, landlord or lessor;
- d. Oral or written publication, in any manner, of material that slanders or libels a person or organization or disparages a person's or organization's goods, products or services;
- e. Oral or written publication, in any manner, of material that violates a person's right of privacy;
- f. The use of another's advertising idea in your "advertisement"; or
- g. Infringing upon another's copyright, trade dress or slogan in your "advertisement".

15. "Pollutants" mean any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.

16. "Products-completed operations hazard":

a. Includes all "bodily injury" and "property damage" occurring away from premises you own or rent and arising out of "your product" or "your work" except:

- (1) Products that are still in your physical possession; or
- (2) Work that has not yet been completed or abandoned. However, "your work" will be deemed completed at the earliest of the following times:
 - (a) When all of the work called for in your contract has been completed.
 - (b) When all of the work to be done at the job site has been completed if your contract calls for work at more than one job site.
 - (c) When that part of the work done at a job site has been put to its intended use by any person or organization other than another contractor or subcontractor working on the same project.

Work that may need service, maintenance, correction, repair or replacement, but which is otherwise complete, will be treated as completed.

b. Does not include "bodily injury" or "property damage" arising out of:

- (1) The transportation of property, unless the injury or damage arises out of a condition in or on a vehicle not owned or operated by you, and that condition was created by the "loading or unloading" of that vehicle by any insured;
- (2) The existence of tools, uninstalled equipment or abandoned or unused materials; or
- (3) Products or operations for which the classification, listed in the Declarations or in a policy schedule, states that products-completed operations are subject to the General Aggregate Limit.

17. "Property damage" means:

a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMs, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

18. "Suit" means a civil proceeding in which damages because of "bodily injury", "property damage" or "personal and advertising injury" to which this insurance applies are alleged. "Suit" includes:

- a. An arbitration proceeding in which such damages are claimed and to which the insured must submit or does submit with our consent; or
- b. Any other alternative dispute resolution proceeding in which such damages are claimed and to which the insured submits with our consent.

19. "Temporary worker" means a person who is furnished to you to substitute for a permanent "employee" on leave or to meet seasonal or short-term workload conditions.

20. "Volunteer worker" means a person who is not your "employee", and who donates his or her work and acts at the direction of and within the scope of duties determined by you, and is not paid a fee, salary or other compensation by you or anyone else for their work performed for you.

21. "Your product":

a. Means:

- (1) Any goods or products, other than real property, manufactured, sold, handled, distributed or disposed of by:
 - (a) You;
 - (b) Others trading under your name; or
 - (c) A person or organization whose business or assets you have acquired; and
- (2) Containers (other than vehicles), materials, parts or equipment furnished in connection with such goods or products.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your product"; and

(2) The providing of or failure to provide warnings or instructions.

c. Does not include vending machines or other property rented to or located for the use of others but not sold.

22. "Your work":

a. Means:

(1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

(2) The providing of or failure to provide warnings or instructions.

LIABILITY POLICY



Liberty Mutual Fire Insurance Company

(A Stock Company herein called the Company)

While this policy is in effect, the named insured first named in the Declarations is a member of Liberty Mutual Holding Company Inc. and is entitled to vote either in person or by proxy at any and all meetings of the members of said company. The Annual Meeting of Liberty Mutual Holding Company Inc. is in Boston, Massachusetts, on the second Wednesday in April each year at ten o'clock in the morning.

The named insured first named in the Declarations Page shall participate in the distribution of any dividends declared by us for this Policy. The amount of such Named Insured's participation is determined by the decision of our Board of Directors in compliance with any laws that apply.

This policy is classified for dividend purposes in DIVIDEND CLASS V.

IN WITNESS WHEREOF, the company has caused this policy to be signed by its President and its Secretary in Boston, Massachusetts; and the countersigned on the declaration page by a duly authorized representative of the company.

Dexter R. J. [Signature]
SECRETARY

Edward F. [Signature]
PRESIDENT

GPO 4079 R2 (03/01/02)

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hereby answers the following interrogatories:

1. Give the names and addresses of persons known by you to be witnesses concerning the facts of the case, indicate whether or not written or recorded statements have been taken from the witnesses, and indicate who has possession of such statements.

ANSWER: Precision Walls incorporates herein those witnesses identified by Liberty Mutual in its interrogatory responses. In addition, see below:

Terri Poland
Owens Corning Sales Representative
419-248-8281 (office)
Terri.poland@owenscorning.com

David Lewsey
Owens Corning
David.lewsey@owenscorning.com

Randy Hug
LW Supply
864-304-3013
rhug@lwsupply.com

Precision Walls knows of no recorded statements from any of the witnesses listed by Liberty Mutual or those listed above.

2. Set forth a list of photographs, plats, sketches, or other prepared documents in your possession that relate to any claim or defense.

ANSWER: Copies of photographs have previously been produced to Liberty Mutual; see LM 00106-00141. See also LM 00085-00089.

3. List the names and addresses of any expert witnesses whom you propose to use as a witness at the trial of the case.

ANSWER: Precision Walls has not retained an expert.

4. For each person known by you to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Defendant of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witness.

ANSWER: Precision Walls incorporates herein Liberty Mutual's responses to Interrogatory No. 4 of Precision Walls. In addition, see below:

Terri Poland is a sales representative of Owens Corning who acknowledged that the Seam and Seal tape manufactured by Berry Plastics was an appropriate product for taping the seams of the Owens Corning foam board.

David Lewsey is believed to be a field representative for Owens Corning who was present at a site meeting and inspection in February of 2010.

Randy Hug works with LW Supply which sold Owens Corning foam insulation board to Precision Walls for use on the Project. He made an e-mail inquiry to Owens

Coming regarding the tape used to seal the insulation joints and got a response to same from Terri Poland (See above).

5. For each expert whom you propose to use as a witness at the trial of the case, set forth a summary of their anticipated testimony sufficient to inform the undersigned party of the evidence, information and documents utilized by such expert in his review of this matter, the opinion reached and the basis thereof, and the theory upon which such opinion is based.

ANSWER: Not applicable.

6. Provide a precise and detailed description of the scope of work that was to be performed by Precision Walls under its subcontract with SYS Constructors ("SYS") on the project referred to as the Tri County Technical College Operational Center (the "Project").

ANSWER: The scope of work is fully described in the subcontract. See LM 169-186.

7. Identify each and every contractor and subcontractor whose scope of work included the performance of any work on the walls of the Project or the supply of any materials for use in the construction of the walls. For each contractor and subcontractor identified in response to this interrogatory, provide a precise and detailed description of the contractor's or subcontractor's scope of work.

ANSWER:

Precision Walls. See LM 169-186 for scope of work.

Pride Masonry. Masonry contractor for the project who tore down and then rebuilt that part of the brick veneer wall encompassing Precision Walls' claim. Pride Masonry bought the materials associated with its work. Precision Walls is not in possession of information that would indicate where such materials were purchased.

8. Provide a precise and detailed description of the "accidental event" referred to in Paragraph 5 of the Complaint and the resulting "remediation" that was required by SYS and set forth all facts supporting your contentions.

ANSWER: The project requirement was that all joints in the exterior insulation board be sealed by tape. Precision Walls proposed the use of Berry Plastic's Seam and Seal tape by tendering a submittal on same to SYS Constructors and the project architect, Neal Prince and Partners. The submittal was reviewed and the product was allowed to be used without objection. (See LM 94-103). Precision Walls applied the Seam and Seal tape on the insulation joints. Thereafter, for reasons not known to Precision Walls, the tape began coming off of the joints. Meetings were held regarding this issue and how to address same. SYS Constructors directed Precision Walls to correct the problem and ensure that all joints were taped per the project requirements and Precision Walls' subcontract with SYS. In some areas, the brick veneer wall had already been constructed so as to prevent access to the insulation joints. In order to re-tape the joints in these areas, the brick veneer wall had to be removed. SYS Constructors engaged the project's masonry subcontractor, Pride Masonry, to tear down the brick veneer walls in these areas. Precision Walls then removed the tape in these areas and applied new tape. Pride Masonry thereafter built a new brick veneer wall.

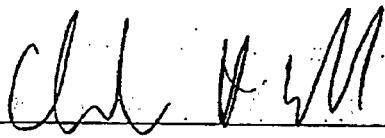
9. Provide a precise and detailed itemized description of all property damage that you contend was caused by an occurrence as those terms are used and defined in the Policy.

ANSWER:

Tearing down brick veneer wall is property damage—it is physical injury to tangible property. The failure of Berry Plastics Seam and Seal tape (i.e. losing its adhesion to poly foam board insulation and coming loose) was an accident. It was unexpected, unintended and an event outside of PWI's control. In order to re-tape the joints, the brick veneer wall had to be removed as there was no other feasible means of access to the wall cavity.

10. Explain the basis for your allegation in Paragraph 9 that Precision Walls is legally obligated to pay SYS for the alleged property damage and set forth all facts supporting your contention.

ANSWER: See SYS letter to Precision Walls dated February 12, 2010 (LM 00201). Also see the sections of the subcontract cited in that letter. (LM 169-186).


Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Counsel for Plaintiff

September 2, 2011



April 5, 2010

Gerry Golt
Precision Walls, Inc.
1230 NE Maynard Road
Cary, NC 27513

VIA CERTIFIED MAIL: 7007 0710 0001 1925 8172

RE: Tri-County Technical College v. Precision Walls, Inc., P505-217587-01

Dear Mr. Golt,

We have received the claim made against you in this matter. Based on our review of the claim and the terms of your Commercial General Liability policy, we have determined that there is a potential of coverage for the claim under the policy. We will investigate the claim, subject to the following reservation of rights.

Precision Walls, Inc. was subcontracted to install insulation on a building under construction for the Tri-County Technical College in Easley, South Carolina. Precision had installed some of the insulating panels, which were joined using tape. Some of the panels had already been covered by brick veneer by another contractor. It was observed that the tape was losing adhesion and that the insulating panels were separating. The separation of the insulating panels was also causing the brick veneer to pull away from the building. Precision Walls was required to replace the tape on the panels already installed. This required that the brick veneer already in place be taken down and reinstalled after the insulation was repaired.

Liberty Mutual provides Commercial General Liability coverage to Precision Walls, Inc. effective from 9/30/2009 to 9/30/2010 under policy number TB2-651-287492-029. This

LM 002

243

APPX 0247

claim potentially alleges "property damage" caused by an "occurrence." Those terms are defined to mean:

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or
- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

These exclusions apply, however:

This insurance does not apply to:

J. Damage To Property

"Property damage" to:

LM 002

244

APPX 0248

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

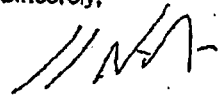
This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

We will not indemnify you for "property damage" that is excluded by these exclusions. There is no coverage under the policy for "property damage" to "your work" or for the cost of repairing or replacing "your work." The only potential coverage available is for any "property damage" to the brick veneer when it separated from the building.

Please continue to forward to us any suits or claims you receive relating to this matter, as well as any other information you believe may affect our position.

While we have attempted to address all of the coverage issues related to this claim, Liberty Mutual reserves all rights under applicable law and the policy. This letter should not be construed as a waiver or estoppel of any possible coverage defenses afforded by the policy or applicable law.

Sincerely,


JJ Williams
800.852.6662 x 445
Post Office Box 100058
Duluth, GA 30096



7007 0710 0001 1925 8172
7007 0710 0001 1925 8172

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PS Form 3800, August 2006 PSN 7530-02-000-9000 See Reverse for Instructions	

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- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. - Print your name and address on the reverse so that we can return the card to you. - Attach this card to the back of the mailpiece, or on the front if space permits.	A. Signature X B. Received by (Printed Name) C. Date of Delivery D. Is delivery address different from item 1? ☐ Yes If YES, enter delivery address below: ☐ No 3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ G.O.D. 4. Restricted Delivery? (Extra Fee) ☐ Yes
1. Article Addressed to: HENRY HOLT PENGUIN GROUP INC 1230 NE MAPLEWOOD DR CARY, NC 27513	
2. Article Number (Transfer from service label)	7007 0710 0001 1925 8172

PS Form 3811, February 2004

Domestic Return Receipt

102505-02-M-1640

LM 0023

246

APPX 0250



November 19, 2010

Gary Roth
Precision Walls
1230 NE Maynard Road
Cary, NC 27513-4174

RE: *Tri-County Technical College v. Precision Walls, Inc., P505-217587-01*

VIA CERTIFIED MAIL: 7007 0710 0001 1924 5646
VIA E-MAIL: groth@precisionwalls.com

Dear Mr. Roth:

We have received the claim made against you in this matter. Based on our review of the claim and the terms of your Commercial General Liability policy, we have determined that the claim is not covered under the policy.

Precision Walls, Inc. was subcontracted to install insulation on a building under construction for the Tri-County Technical College in Easley, South Carolina. Precision had installed the insulating panels, which were joined using tape. Some of the panels had already been covered by brick veneer by another contractor. It was observed that the tape was losing adhesion and that the insulating panels were separating. Precision Walls was required to replace the tape on the panels already installed. This required that the brick veneer already in place be taken down and reinstalled after the insulation was repaired.

Liberty Mutual provides Commercial General Liability coverage to Precision Walls, Inc. effective from 9/30/2009 to 9/30/2010 under policy number TB2-651-287492-029. This claim potentially alleges "property damage" caused by an "occurrence." Those terms are defined to mean:

13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

17. "Property damage" means:

- a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or

LM 00235

- b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

For the purposes of this insurance, electronic data is not tangible property.

As used in this definition, electronic data means information, facts or programs stored as or on, created or used on, or transmitted to or from computer software, including systems and applications software, hard or floppy disks, CD-ROMS, tapes, drives, cells, data processing devices or any other media which are used with electronically controlled equipment.

These exclusions remove all coverage:

This insurance does not apply to:

J. Damage To Property

"Property damage" to:

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or
- (6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

L. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

LM 0024C

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

22. "Your work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and
- (2) The providing of or failure to provide warnings or instructions.

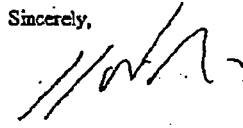
The only "property damage" alleged to have occurred in this case was to "your work." You have confirmed that there was no damage to the brick veneer caused by the failure of the tape. The brick veneer was only damaged in the process of removing it to repair "your work." There is no coverage under the policy for "property damage" to "your work" or for the cost of repairing or replacing "your work."

Please continue to forward to us any suits or claims you receive relating to this matter, as well as any other information you believe may affect our position.

LM 00241

While we have attempted to address all of the coverage issues related to this claim, Liberty Mutual reserves all rights under applicable law and the policy. This letter should not be construed as a waiver or estoppel of any possible coverage defenses afforded by the policy or applicable law.

Sincerely,



JJ Williams
Senior Claims Consultant
Post Office Box 300003
Lawrenceville, GA 30049
800-852-6662 x 15799
Fax: 603-334-8106

cc: Brennan Collins, Liberty Mutual

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. - Print your name and address on the reverse so that we can return the card to you. - Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature X ☐ Agent ☐ Addressee	
1. Article Addressed to: MARY ROTH PRECISION WARE 1230 NE MAYNARD ROAD CARY, NC 27513		B. Received by (Printed Name) C. Date of Delivery	
2. Article Number (Transfer from service label) 7007 0710 0001 1924 5646		D. Is delivery address different from item 1? ☐ Yes ☐ No If YES, enter delivery address below:	
3. Service Type ☒ Certified Mail ☐ Express Mail ☐ Registered ☐ Return Receipt for Merchandise ☐ Insured Mail ☐ C.O.D.		4. Restricted Delivery? (Extra Fee) ☐ Yes	

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-04-1540

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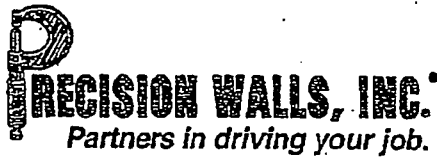
Sent To
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or PO Box No.
City, State, ZIP+4

PS Form 3800, August 2005 See Reverse for Instructions

LM 0024

250

APPX 0254



CORPORATE OFFICE
1230 NE Maynard Road
Cary, NC 27513-4174
(919) 832-0380 / FAX (919) 839-1402

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Interior Glass
Sections

Vinyl Wall Coverings

Operable & Accordion
Partitions

Projection Screens

Residential Drywall
& Paint

December 1, 2010

Liberty Mutual
Attn: JJ Williams, Senior Claims Consultant
Post Office Box 300003
Lawrenceville, Georgia 30049

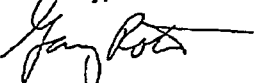
Re: Precision Walls Claim on Tri-County Tech Project
Claim No.: P505-217587-01

Mr. Williams:

This will acknowledge receipt of your letter dated November 19, 2010 wherein you notify Precision Walls that Liberty Mutual has denied the above claim. Precision Walls has reviewed the basis for the denial of the claim as set forth in the letter and disagrees that coverage does not exist. Precision Walls believes that the costs to remove and replace the brick veneer wall constitute property damage caused by an occurrence under the terms of the applicable policy. Further, Precision Walls does not believe that any policy exclusions apply to remove coverage. Accordingly, Precision Walls demands that Liberty Mutual accept coverage of the claim and pay the amount that Precision Walls is obligated to pay to SYS Constructors and/or the owner of the project.

Moreover, the actions of Liberty Mutual in investigating and analyzing the claim led Precision Walls to believe that Liberty Mutual accepted coverage of this claim. This late attempt to deny coverage has the potential to cause further harm to Precision Walls. Liberty Mutual is advised to reconsider its position and accept coverage of this claim. Time is of the essence and your prompt response to this request is required.

Sincerely,


Gary Roth
Chief Operating Officer

Raleigh - Greensboro - Charlotte - Greenville - Wilmington, NC
Columbia - Greenville / Spartanburg, SC - Louisville, KY
www.precisionwalls.com

LM 00201

251

APPX 0255



January 12, 2011

Gary Roth
Precision Walls
1230 NE Maynard Road
Cary, NC 27513-4174

CERTIFIED MAIL no. 7010 1870 0002 6238 2078

RE: *Tri-County Technical College v. Precision Walls, Inc., P505-217587-01*

Dear Mr. Roth:

We have received your recent letter objecting to our denial of coverage in this matter. We have again reviewed the claim and your Commercial General Liability policy, and we have determined that there is no coverage under the policy for this claim.

Precision Walls, Inc. was subcontracted to install insulation on a building under construction for the Tri-County Technical College in Easley, South Carolina. Precision had installed the insulating panels, which were joined using tape. Some of the panels had already been covered by brick veneer by another contractor. It was observed that the tape was losing adhesion and that the insulating panels were separating. Precision Walls was required to replace the tape on the panels already installed. This required that the brick veneer already in place be taken down and reinstalled after the insulation was repaired.

Liberty Mutual provided Commercial General Liability coverage to Precision Walls, Inc. effective from 9/30/2009 to 9/30/2010 under policy number TB2-651-287492-029. You have asserted that brick veneer was damaged by the failure of "your work." We disagree. The brick veneer was undamaged until it had to be taken down and replaced. Even if that constituted "property damage" caused by an "occurrence," these exclusions would remove all coverage:

This insurance does not apply to:

j. **Damage To Property**

"Property damage" to:

- (5) That particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

LM 00151

252

APPX 0256

(6) That particular part of any property that must be restored, repaired or replaced because "your work" was incorrectly performed on it.

Paragraphs (3), (4), (5) and (6) of this exclusion do not apply to liability assumed under a sidetrack agreement.

Paragraph (6) of this exclusion does not apply to "property damage" included in the "products-completed operations hazard".

l. Damage To Your Work

"Property damage" to "your work" arising out of it or any part of it and included in the "products-completed operations hazard".

This exclusion does not apply if the damaged work or the work out of which the damage arises was performed on your behalf by a subcontractor.

m. Damage To Impaired Property Or Property Not Physically Injured

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency, inadequacy or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or "your work" after it has been put to its intended use.

22. "Your work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and

(2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

(1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work"; and

(2) The providing of or failure to provide warnings or instructions.

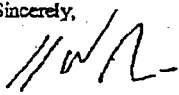
The only "property damage" alleged to have occurred in this case was to "your work." You have confirmed that there was no damage to the brick veneer caused by the failure of the tape. The brick veneer was only damaged in the process of removing it to repair "your work." There is no coverage under the policy for "property damage" to "your work" or for the cost of repairing or replacing "your work." A Commercial General Liability policy does not function as a guarantee of the insured's work.

You have also argued that Liberty Mutual should be estopped from denying coverage for this matter because we initially conducted an investigation under a reservation of rights. We disagree. Our original letter to you specifically reserved our right to raise additional policy defenses once our investigation was completed. An insurer has the right and the obligation to conduct an investigation into a claim before taking a coverage position. In addition, coverage under an insurance policy cannot be expanded by waiver or estoppel unless the insured can prove that its rights have been jeopardized by the insurer's conduct. There is no indication that your rights have been jeopardized in any way.

Please continue to forward to us any suits or claims you receive relating to this matter, as well as any other information you believe may affect our position.

While we have attempted to address all of the coverage issues related to this claim, Liberty Mutual reserves all rights under applicable law and the policy. This letter should not be construed as a waiver or estoppel of any possible coverage defenses afforded by the policy or applicable law.

Sincerely,



JJ Williams

Senior Claims Consultant

Post Office Box 300003
Lawrenceville, GA 30049
800-852-6662 x 15799
Fax: 603-334-8106

CC: Brennan Collins, Liberty Mutual

LM 00153

No. R49
CLERK OF THE SENATE

4-1
No. _____
CODE COMMISSIONER

AN ACT

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 38-61-78 SO AS TO DEFINE A "COMMERCIAL GENERAL LIABILITY INSURANCE POLICY", "CONSTRUCTION PROFESSIONAL", AND "CONSTRUCTION RELATED WORK", TO PROVIDE THAT A COMMERCIAL GENERAL LIABILITY INSURANCE POLICY MUST DEFINE OR BE DEEMED TO DEFINE THE WORD "OCCURRENCE" IN A SPECIFIC MANNER, AND TO PROVIDE FOR THE SCOPE AND LIMITS OF APPLICABILITY OF THIS SECTION.

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

MAY 17 2011

Mark Hammond
SECRETARY OF STATE OF SOUTH CAROLINA

I Certify that the Within Originated in the Senate.

Jeffery Harvett
Clerk of the Senate

Correctly Enrolled _____

Stephen T. Draffin
Stephen T. Draffin, Director
Legislative Council

MAY 17 2011.

Delivered to the Governor this _____

day of _____, A.D. 20 _____

Jeffery Harvett
Clerk of the Senate

Delivered to the Secretary of State this 17th

day of May, A.D. 20 11

Mark Hammond

THE STATE OF SOUTH CAROLINA

At A General Assembly Begun to be Holden at
Columbia, on the Second Tuesday in January, in the
Year of Our Lord Two Thousand Eleven, and Thence
Continued by Divers Adjournments to the
_____ of _____

In the Year of Our Lord Two Thousand Eleven

AN ACT

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA,
1976, BY ADDING SECTION 38-61-70 SO AS TO DEFINE A
"COMMERCIAL GENERAL LIABILITY INSURANCE
POLICY", "CONSTRUCTION PROFESSIONAL", AND
"CONSTRUCTION RELATED WORK", TO PROVIDE THAT
A COMMERCIAL GENERAL LIABILITY INSURANCE
POLICY MUST DEFINE OR BE DEEMED TO DEFINE THE
WORD "OCCURRENCE" IN A SPECIFIC MANNER, AND TO
PROVIDE FOR THE SCOPE AND LIMITS OF
APPLICABILITY OF THIS SECTION.

Be it enacted by the General Assembly of the State of South Carolina:

Commercial general liability insurance policies, definitions,
requirements, application limited to coverage for construction
professionals for liability arising from construction related work

SECTION 1. Chapter 61, Title 38 of the 1976 Code is amended by
adding:

"Section 38-61-70. (A) For purposes of this section:

(1) 'Commercial general liability insurance policy' means a
contract of insurance that covers occurrences of damages or injury
during the policy period and insures a construction professional for
liability arising from construction related work.

\\ACTS431AB11.DOCX

(2) 'Construction professional' means a person, sole proprietorship, partnership, corporation, limited liability company, or other recognized legal entity that engages in the development, construction, installation, or repair of an improvement to real property.

(3) 'Construction related work' means activities by a construction professional involving the development, construction, installation, or repair of an improvement to real property.

(B) Commercial general liability insurance policies shall contain or be deemed to contain a definition of 'occurrence' that includes:

(1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and

(2) property damage or bodily injury resulting from faulty workmanship, exclusive of the faulty workmanship itself.

(C) This section is not intended to restrict or limit the nature or types of exclusions from coverage that an insurer, including a surplus lines insurer, may include in a commercial general liability insurance policy.

(D) This section applies only to a commercial general liability insurance policy that insures a construction professional for liability arising from construction related work.

(E) This section applies to any pending or future dispute over coverage that would otherwise be affected by this section as to all commercial general liability insurance policies issued in the past, currently in existence, or issued in the future."

Severability clause

SECTION 2. If any section, subsection, paragraph, subparagraph, sentence, clause, phrase, or word of this act is for any reason held to be unconstitutional or invalid, such holding shall not affect the constitutionality or validity of the remaining portions of this act, the General Assembly hereby declaring that it would have passed this act, and each and every section, subsection, paragraph, subparagraph, sentence, clause, phrase, and word thereof, irrespective of the fact that any one or more other sections, subsections, paragraphs, subparagraphs, sentences, clauses, phrases, or words hereof may be declared to be unconstitutional, invalid, or otherwise ineffective.

Time effective

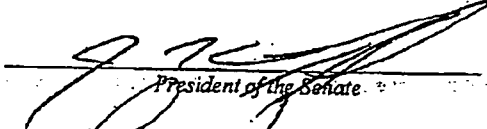
SECTION 3. This act takes effect upon approval by the Governor and applies to any pending or future dispute over coverage that would otherwise be affected by this section as to commercial general liability

insurance policies issued in the past, currently in existence, or issued
in the future.

—XX—

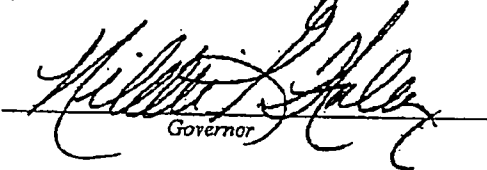
MAY 17 2011

In the Senate House


President of the Senate


Speaker of the House of Representatives

Approved the 17th day of May 2011.


Governor

LEGISLATIVE COUNCIL
of the
GENERAL ASSEMBLY OF SOUTH CAROLINA

Stephen T. Draffin, Director

Attorney: Beeson

Stenographer: Morgan

S. 431

Legislative Council No. (486) 431AB11

Doc. No.: L:\COUNCIL\ACTS\431AB11.DOCX

Statewide: ☒ Local: ☐ Temporary: ☐

Proofread by Charles M. P. Smith

Ouzts, Steven W.

From: Ouzts, Steven W.
Sent: Thursday, August 23, 2012 2:36 PM
To: 'emillerj@sccourts.org'
Cc: 'Chuck H. McDonald'; 'emillerlc@sccourts.org'; Melton, S. Renee
Subject: Precision Walls v. Liberty Mutual Fire Insurance Company, Case No. 2011-CP-23-2028
Attachments: doc.pdf

Dear Judge Miller:

Please see the attached letter concerning the case referenced above.

Respectfully,

Steven W. Ouzts

TURNER PADGET
TURNER PADGET CREATHAM & LANTY PA.

Steven Ouzts

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CHARLESTON
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GREENVILLE
MYRTLE BEACH

Steven W. Ouzts

REPLY TO:

E-Mail: SOuzts@TurnerPadget.com
Writer's Direct Dial: (803) 227-4244
Direct Fax: (803) 400-1520

August 23, 2012

VIA EMAIL AND U.S. MAIL

Honorable Edward W. Miller
Greenville County Courthouse
305 E. North Street, Suite 219
Greenville, SC 29601

Re: Precision Walls, Inc. v. Liberty Mutual Fire Insurance Company, Case No. 2011-CP-23-2028

Dear Judge Miller:

I represent the defendant Liberty Mutual Fire Insurance Company in the case referenced above, which presently is listed 25th on the non-jury trial roster for the term set for September 4-7, 2012. I understand Your Honor will be presiding. Plaintiff's counsel, Charles McDonald, and I have reached an agreement to submit the case for decision based upon the same depositions, answers to interrogatories, exhibits and briefs previously used in connection with our cross-motions for summary judgment. The summary judgment motions were heard and denied by Judge Stilwell in May 2012 just before his deployment.

Plaintiff's counsel and I believe the most efficient and economical way to proceed would be to re-submit the case to Your Honor on the same record and legal briefs previously submitted with the summary judgment motions, with a stipulation that all issues of fact or law would be resolved based upon the agreed record. The only exception would be the Plaintiff's Third Cause of Action, a claim for statutory attorney fees, which was dismissed, with prejudice, by stipulation of the parties at the summary judgment hearing. If Your Honor is agreeable to our proceeding in this way, we would request the Court set a time for oral argument on the case on September 6 or 7, if possible. Judge Welmaker previously granted me protection on September 4 and Mr. McDonald asks that argument of this case not be scheduled on September 5 because of a hearing on another case of his in Aiken County. We estimate argument would take about one hour.

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TURNER PADGET

Honorable Edward W. Miller

August 23, 2012

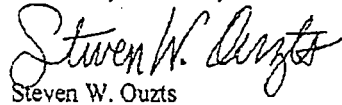
Page 2

The case is an insurance coverage dispute arising out of the construction of the Tri-County Technical College Occupational Center in Easley. Precision Walls was a subcontractor insured under a commercial general liability insurance policy issued by Liberty Mutual. The essential facts are undisputed and the issues presented are legal issues pertaining to interpretation and application of certain provisions of the insurance policy.

We would be pleased to discuss the matter further with the Court, if Your Honor wishes. Otherwise, please let us know whether it is acceptable to the Court to proceed in this manner. Thank you for your consideration.

Sincerely,

TURNER, PADGET, GRAHAM & LANEY, P.A.



Steven W. Ouzts

SWO:

cc: Charles H. McDonald, Esq.
Helena Jedziniak, Esq.

Ouzts, Steven W.

From: Chuck H. McDonald <CMcDonald@robinsonlaw.com>
Sent: Friday, August 31, 2012 9:20 AM
To: emillerj@sccourts.org
Cc: emillerlc@sccourts.org; Melton, S. Renee; Ouzts, Steven W.
Subject: RE: Precision Walls v. Liberty Mutual Fire Insurance Company, Case No. 2011-CP-23-2028

Judge Miller:

I represent the Plaintiff, Precision Walls, in the above matter. It is case number 20 on the non-jury trial roster for next week. Steve Outz, counsel for Defendant Liberty Mutual, wrote the Court on August 23 advising that the parties would be prepared to present this matter to you next week in the form of a renewed cross motion for summary judgment based on the record on file with the Court (briefs and affidavits). I certainly consent to proceeding in this manner. I also wanted to advise the Court that my scheduling issue for September 5th has been resolved. I am available next week to proceed as the parties propose whenever it would work for the Court. As I am in Columbia, I would ask for 24 hours notice if possible.

As Mr. Outz has protection from the roster meeting and the parties have advised the Court of the status of the matter and their availability to have this matter heard next week, I respectfully request that I be excused from attending the roster meeting on Tuesday morning.

Regards,

Chuck McDonald



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cmcdonald@robinsonlaw.com
v-card

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Columbia, South Carolina 29202

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 MERITAS LAW FIRMS WORLDWIDE

From: Ouzts, Steven W. [mailto:SOuzts@TurnerPadgett.com]
Sent: Thursday, August 23, 2012 2:36 PM
To: emillerj@sccourts.org
Cc: Chuck H. McDonald; emillerlc@sccourts.org; Melton, S. Renee
Subject: Precision Walls v. Liberty Mutual Fire Insurance Company, Case No. 2011-CP-23-2028

Dear Judge Miller:

Please see the attached letter concerning the case referenced above.

Respectfully,

Steven W. Ouzts

TURNER PADGET

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/..

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Precision Walls, Inc.

Plaintiff,

vs.

Liberty Mutual Fire Insurance Co.,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2011-CP-23-2028

) **MOTION OF DEFENDANT LIBERTY**
) **MUTUAL FIRE INSURANCE CO. FOR**
) **SUMMARY JUDGMENT**

The Defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") hereby moves for summary judgment pursuant to S.C. R. Civ. P. 56 on each of the claims asserted by Plaintiff in the Amended Complaint. The pleadings, depositions, answers to interrogatories, and admissions on file, together with the exhibits attached to this motion, show there is no genuine issue as to any material fact and that Liberty Mutual is entitled to judgment as a matter of law. The losses claimed by Plaintiff under the Liberty Mutual insurance policy that is the subject of the action are not covered "property damage" as defined in the insurance policy, did not result from an "occurrence," and were excluded by certain business risk exclusions. In further support of this motion, Liberty Mutual submits the following memorandum of law.

STATEMENT OF FACTS

Precision Walls, Inc. was a subcontractor to SYS Constructors, Inc. ("SYS") on a construction project referred to as the Tri-County Technical College Occupational Center (the "Project"). (Amended Complaint at ¶ 4). For a one-year period during the Project, from September 30, 2009 to September 30, 2010, Precision Walls was insured under a commercial general liability policy (Policy No. TB2-651-287492-029) issued to Precision Walls by Liberty Mutual (the "Policy"). The terms and conditions of the Policy are incorporated by reference in

Plaintiff's Amended Complaint. (Amended Complaint at ¶ 3). A certified copy of the Policy is attached hereto as Exhibit 1.

The Amended Complaint alleges Precision Walls is entitled to coverage under the Policy for the sum of \$97,500, which is the amount SYS deducted from final payment to Precision Walls pursuant to a deductive change order to the subcontract. (Amended Complaint at ¶ 9). The deductive change order was issued by SYS on September 27, 2010 (Exhibit 2), but not accepted by Precision Walls until November 2011 (Exhibit 3). For reasons more fully explained below, Liberty Mutual denied coverage of the claim because the deductive change order was not for "property damage" as defined in the Policy, did not result from an "occurrence," and was excluded by certain business risk exclusions in the Policy.

Insofar as pertinent to this case, the scope of work to be performed by Precision Walls was described as follows in the subcontract, attached hereto as Exhibit 4:¹

"Scope of work includes all material, labor, equipment and supervision of the following: all light gauge metal framing of walls, roof trusses and decking, building insulation, densglass on exterior, taped and sealed blue board insulation on exterior, installation of door frames. . . . Exterior insulation to be sealed so as to prevent air infiltration."

The deductive change order for which Precision Walls seeks reimbursement under the Policy was for costs incurred by SYS and back-charged to Precision Walls for the removal of brick veneer siding in some sections of the wall in order to gain access to the taped insulation board underneath. This work is described by Precision Walls in its answer to Defendant's interrogatory no. 8. (Exhibit 5). In summary, Precision Walls had begun to install the insulation

¹ Plaintiff's Answers to Defendant's First Set of Interrogatories (response no. 6) references the Precision Walls subcontract for the full scope of work. A copy of the Plaintiff's answers to interrogatories are attached hereto as Exhibit 5. The original is on file with the court.

board ("blue board") and apply an adhesive tape to seal the seams between the boards as specified by the subcontract. Before the installation of the blue board and seal tape were completed, SYS observed that some of the tape was coming loose. After further investigation, SYS determined that the seal tape used by Precision Walls was unsuitable and would have to be replaced with another tape. In some wall sections, the brick veneer siding had already been installed by the masonry subcontractor over the insulation board. SYS determined the brick veneer would have to be removed from those wall sections in order to allow access to the underlying insulation board to replace the seal tape. Once the seams of the insulation board were re-sealed with the new tape, a new brick veneer siding was put back on.

When SYS made the decision to remove the brick veneer siding it was fully intact and there was no damage, according to the testimony of Kevin Howell, Precision Walls' project manager. (Deposition of Kevin Howell at p. 44, lines 11-17).² The only reason SYS required the removal of the brick veneer was to allow access to the insulation board underneath so the seal tape could be replaced. (*Id.* at p. 65, lines 9-16). There was nothing wrong with the brick veneer itself. (*Id.*) Mr. Howell testified to the accuracy of these facts as recorded in the claim notes of Liberty Mutual's claims representative on October 6 and 25, 2010. (*Id.* at p. 75, line 14 to 76, line 2; and 79, line 21 to 80, line 13).³

Liberty Mutual had informed Precision Walls by letter of April 5, 2010 that it would conduct its investigation under a full reservation of all rights under the Policy to deny coverage if warranted by the facts. (Exhibit 7). After confirming with the insured there was no physical injury to the brick veneer, Liberty Mutual determined there was no coverage for the losses

² The entire transcript of the deposition of Kevin Howell is on file with the court. The excerpts referenced herein are attached for convenience as Exhibit 6.

³ The Liberty Mutual Claim Notes referenced in Mr. Howell's deposition testimony were attached as deposition exhibits 3 and 16 and are included as part of Exhibit 6 to this motion.

claimed by Precision Walls and so notified Precision Walls by letter dated November 19, 2010. (Exhibit 8). In response to Precision Walls's request for reconsideration (Exhibit 9), Liberty Mutual confirmed its denial of coverage by letter of January 12, 2011 (Exhibit 10). This lawsuit ensued.

LEGAL ANALYSIS AND ARGUMENT

1. Precision Walls' losses are not "property damage" but economic losses resulting from the costs to repair its non-conforming work under the subcontract.

In *L.J., Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005), the South Carolina Supreme Court sounded a consistent theme when it denied coverage under a commercial general liability policy for claims for money damages incurred by the insured subcontractor because of its faulty workmanship under a construction contract. "[A] CGL policy is not intended to cover economic loss resulting from faulty workmanship," the court said. 366 S.C. at 122, 621 S.E.2d 33 at 36, citing *Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 563-64, 561 S.E.2d 355, 357 (2002). The court reasoned that "any liability that is incurred because of faulty workmanship is part of the insured's contractual liability, not an insurable event under a CGL policy." *Id.* (citations omitted). Therefore, the court held that a commercial general liability insurance policy "will not stand to cover liability for the Contractor's contract liability for a claim that was for money damages to compensate for the defective work." 348 S.C. at 124, 561 S.E.2d at 36-37. To hold otherwise, said the court, would transform the CGL policy into a performance bond, which guarantees the work, rather than an insurance policy, which is intended to insure against accidents. *Id.* "Consequently," said the court, "our holding today ensures that ultimate liability falls to the one who performed the negligent work – the subcontractor – instead of the insurance carrier."

Among the case authorities referenced in support of the court's analysis in *L.J.* was *C.D. Walters Construction Co. v. Fireman's Insurance Company of Newark*, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984), which explains the difference between "business risks" assumed by a contractor in the ordinary, normal course of business and "insurable risks" assumed by the contractor's insurance company under a commercial general liability insurance policy:

"The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained."

281 S.C. at 596, 316 S.E.2d at 712, *quoting with approval, Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 791 (1979). In summary said the court, "the [comprehensive] general liability policy does not cover . . . faulty workmanship, but rather faulty workmanship which causes an accident." *Id.*

More recently, in *Crossman Communities of North Carolina, Inc. v. Harleyville Mutual Insurance Co.*, ____ S.C. ____, 717 S.E.2d 589 (2011), the court returned to the same theme when it drew a distinction between the cost of repairing or removing defective work, which the court said was not "property damage" and, therefore, not covered under a commercial general liability policy, and the cost of repairing consequential damage caused by the defective work, which may be. The "property damage" for which the court found coverage in *Crossman* was progressive physical damage to interior elements of the building caused by water intrusion through negligently installed exterior siding. On the other hand, the costs to repair the defective construction were not covered "property damage."

In this case, the only "property damage" alleged by Precision Walls is the cost of tearing down the otherwise undamaged brick veneer wall "[i]n order to re-tape the joints" of the underlying insulation board. See Plaintiff's Answers to Defendants First Set of Interrogatories, Response No. 9 (Exhibit 5). The brick veneer had to be removed only because "there was no other feasible means of access to the wall cavity." *Id.* Furthermore, the reason for the remedial action was to "ensure that all joints were taped per the project requirements and Precision Walls' subcontract with SYS." (*Id.* at response no. 8). Precision Walls' claim is not covered because it seeks recovery of an economic loss, i.e. the cost to repair its defective construction, which is not "property damage" as defined in the Policy.

The Policy's standard insuring agreement states, in pertinent part, as follows:

"1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . .
- b. This insurance applies to 'bodily injury' and 'property damage' only if:
 - (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory';
 - (2) The 'bodily injury' or 'property damage' occurs during the policy period; and

(Exhibit 1 at Section I – Coverages, part 1 - Insuring Agreement, a. and b.)

With respect to claims such as Precision Walls' seeking coverage based upon physical injury to property, the term "property damage" is defined as: "a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it. . . . (Exhibit 1 at Section V.- Definitions, part 17. a.)

Courts that have applied the same or similar definition of "property damage" to a claim like that of Precision Walls in this case have held that the incorporation of a defective product into a building may result in diminution in value of the building because of the use of an inferior material, but it is not "physical injury to tangible property" or "loss of use of tangible property" under a commercial general liability insurance policy. *E.g., New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696, 699 (9th Cir. 1991), *quoting with approval, Federated Mutual Ins. Co. v. Concrete Units, Inc.*, 363 N.W.2d 751, 756 (Minn. 1985). Not only is this conclusion supported by the plain language of the Policy, but also by sound principles of public policy, said the court in *Vieira*, because "the opposite result would transform a general liability insurance policy into a guarantee or contractual performance bond." 930 F.2d at 701.

The contractor seeking coverage in *Vieira* argued that the repair of the defective construction resulted in property damage because it required holes to be cut in the roofs of the buildings in order to install drywall that was specified by the contract but omitted by the contractor. Rejecting this contention, the court held "the nature of repairs cannot create coverage where none exists." *Id.* The court observed that, "[d]iminution in value and cost of repair are not two separate harms – they are two different ways of measuring the same harm." *Id.* "If the harm - *Vieira's* defective work is not covered as measured by diminished value, it is not covered as measured by the cost of repair," the court said. *Id.* at 701-02. In the final analysis, the court held the owner's decision to make repairs that caused damage to the roofs did not create liability under the policy. *Id.*

Similarly, in *Traveler's Ins. Co. v. Eljer Manufacturing, Inc.*, 197 Ill.2d 278, 757 N.E.2d 481 (2001), the Illinois Supreme Court held that economic losses resulting from a building owner's voluntary decision to remove and replace a defective polybutylene plumbing system

were not "property damage" and, therefore, not covered under a commercial general liability policy that defined "property damage" as "physical injury to tangible property." 757 N.E.2d at 494-504. The court rejected the building owners' arguments that damage to the walls, or floors, or ceilings caused by the removal of the plumbing system were covered "property damage." *Id.* at 504. The court said "[t]he 'injury' caused by the Qest system under these facts flows from the claimant's disappointed commercial expectations in the performance of the Qest system and is not an injury which is 'physical' in nature." *Id.* (emphasis in original). Furthermore, "[c]onsistent with the policy language agreed upon by the parties to the insurance contract, the insurers did not consent to become guarantors of the product quality or the performance of the Qest systems," the court said. *Id.* It declined to interpret the liability policy to find coverage for the cost of repairing or replacing defective work, which would have the effect of transforming the liability policy into something like a performance bond. *Id.* at 503.⁴

South Carolina follows the same logic and reasoning. See, *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003) ("Most courts hold the diminished value of tangible property does not constitute property damage within the meaning of CGL policies which define property damage as physical injury.") In fact, the *Brazell* court referenced *Federal Mutual, supra*, the same case relied upon by *Vieira*, as an example of a case in which the incorporation of a defective material into a building resulting in diminution in value of the building does not constitute "physical injury to tangible property." *Id.* at 356 S.C. 162, 588 S.E.2d 115.

Other courts from around the country have followed the same principles to preclude coverage under commercial general liability policies for economic losses resulting from the

⁴The court noted that the owners' remedy for the losses they incurred were against the manufacturer of the defective product. 717 N.E.2d at 504, n. 6.

repair or replacement of defective work or products that have not caused "physical injury to tangible property" aside from damage related to the repair work itself. *E.g., Jacob v. Russo Builders*, 224 Wis.2d 436, 450, 592 N.W.2d 271, 277 (1999) (Damages to driveway, sidewalk, patio, and landscaping resulting from the need to get access for repair and replacement of defective masonry were not "property damage" that resulted from insured's defective work, but were the result of repair efforts by others, and, therefore, not covered by subcontractors commercial general liability policy); *Fireman's Ins. Co. of Newark v. National Union Fire Ins. Co.*, 387 N.J. Super. 434, 904 A.2d 754 (A.D. 2006) (Damages caused by removal and replacement of substandard firewalls were not covered "property damage" under commercial general liability policy).

In this case, it is an undisputed fact that the loss of adhesion of the seal tape applied by Precision Walls to the insulation board caused no "physical injury" to the brick veneer siding. Rather, the costs incurred for the removal and replacement of the brick veneer were the result of the general contractor's decision to remove and replace the defective tape on the underlying insulation board. Applying the logic and reasoning of the aforementioned case authorities, these costs of removal and replacement of the brick veneer are not covered "property damage" under the Policy.

2. The losses claimed by Precision Walls were not the result of an "occurrence."

The insuring agreement referenced above covers "property damage" only if it is caused by an "occurrence." According to the Policy Definitions, the term "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Policy, Exhibit 1 at Section V – Definitions, part 13). In *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, *supra*, the South Carolina Supreme Court, following the majority rule

in other jurisdictions, held that faulty workmanship is not an "occurrence" where the claim is for money damages to compensate for repairing the defective work. 366 S.C. at 124, 621 S.E.2d at 36. As explained above, Precision Walls' claim for the cost incurred for the removal and replacement of the undamaged brick veneer were for the correction of defective work, and therefore not an "occurrence." The brick veneer was not damaged by the loss of adhesion of the seal tape on the insulation board, but by the general contractor's decision to effect the repair and replacement of the faulty insulation tape.

The recent decision of the South Carolina Supreme Court in *Crossman*, *supra* does not change the conclusion drawn from *L.J.* Unlike the present case, the claim at issue in *Crossman* was for progressive damages to other property caused by water intrusion through the negligently installed exterior siding. The court was construing the part of the definition of "occurrence" concerning "continuous or repeated exposure to substantially the same general harmful conditions." By contrast, here there is no allegation of progressive property damage. The question is simply whether the voluntary decision to remove the brick veneer was an "accident," which it plainly was not.

Likewise, S.C. Act No. R49 (to be codified as S.C. Code 38-61-70), which took effect May 17, 2011, is not applicable.⁵ The definition of "occurrence" set forth in the Act would not include faulty workmanship itself. *See*, S.C. Act No. R49 at Section 1, 38-61-70(B)(2).⁶

⁵ The retroactive application of S.C. Act No. R49 in this case would violate the rights of Liberty Mutual under the Contract Clause, the Equal Protection Clause, and Due Process Clause of the United States Constitution and similar provisions of the South Carolina Constitution. Without waiving its objections based upon the unconstitutionality of the Act, Liberty Mutual believes the court need not reach those issues, because the Act, by its terms, does not purport to alter the definition of "occurrence" as applied to the repair of faulty workmanship.

⁶ A copy of S.C. Act No. R49 attached as Exhibit 11.

This court need not reach the issue of whether or not the losses claimed by Precision Walls resulted from an "occurrence" because Liberty Mutual has already shown there was no "property damage." See, *Crossman*, 717 S.E.2d 589 ("[I]t is only after 'property damage' has been alleged that the question of 'occurrence' is reached."). Even so, the undisputed facts show the losses claimed by Precision Walls were not the result of an "accident," and, therefore, there was no "occurrence" as defined in the Policy.

3. Coverage for the losses claimed by Precision Walls is excluded by the "Damage to Property" Exclusion.

As an alternative grounds for summary judgment, Liberty Mutual would show that any losses that may be found to be within the coverage of the insuring agreement are excluded by Exclusion 2.j. (Exhibit 1, Section 1 – Coverages – part 2. Exclusions. – subpart j.) In pertinent part, it excludes coverage for "property damage" to:

"(5) That particular part of real property on which you or any contractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) That particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it."

The term "your work" is defined as follows:

22. "Your Work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and
- (2) The providing of or failure to provide warnings or instructions.

(Policy, Exhibit 1 at Section V – Definitions, part 22).

An exclusion virtually identical to this one was applied by the South Carolina Supreme Court in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), overruled on other grounds, *Crossman Communities of N.C., Inc. v. Harleyville Mut. Ins. Co.*, 717 S.E.2d 589 (2011)(trigger of coverage). In *Century*, a homeowner sought coverage under a contractor's commercial general liability policy for property damage to the exterior wall sheathing and substrate of their home caused by water intrusion through an exterior stucco cladding that was improperly installed. Rejecting the homeowners' argument that the exclusion applied only to the defective work (the stucco cladding) and not the damage to the underlying substrate, the court held: "Based on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision." (citations omitted). 348 S.C. at 566, 561 S.E.2d at 359. As supporting precedent, the court referenced a number of cases from South Carolina and other states that had applied a similar exclusion in analogous factual circumstances, including *Engineered Prods, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 368 S.E.2d 674 (Ct. App. 1988)(coverage excluded for damages resulting from restoration, repair, or replacement of rack system where losses were the result of subcontractor's failure to properly install anchor system); and *C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey*, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (coverage excluded for property damages resulting from faulty workmanship).

Each of these cases follows the consistent theme that commercial general liability policies do not cover contractual liabilities for economic losses resulting from the failure of the insured to properly perform his work. The losses for which Precision Walls seeks reimbursement from Liberty Mutual under the Policy are a classic example of the type of business risk that is the responsibility of Precision Walls, not its liability insurer.

4. Coverage for the losses claimed by Precision Walls is excluded by the "Impaired Property" Exclusion.

According to Exclusion "m" coverage is excluded for:

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or your work after it has been put to its intended use."

(Policy, Exhibit 1 - Section I - Coverages, part 2 - Exclusions - subpart m.)

The term "impaired property" is defined as follows:

"8. Impaired property" means tangible property, other than "your product" or "your work" that cannot be used or is less useful because:

- a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or
- b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement."

(Policy, Exhibit 1 - Section V - Definitions - part 8).

Even if the losses claimed by Precision Walls were determined to be within the coverage of the insuring agreement, they would nonetheless be excluded by Exclusion m. Precision Walls contends that the usefulness of the wall clad with the brick veneer siding was "impaired" because it incorporated defective work not in compliance with the terms of Precision Walls' subcontract. Furthermore, Precision Walls contends the "impaired property" was restored by the repair and replacement of the defective work or product of Precision Walls, which could only be effected by removal of the brick veneer siding. The "impaired property" exclusion would apply to the costs of repair and replacement of the defective work and any loss of use. *See, St. Paul Fire and Marine Ins. Co. v. Futura Coatings, Inc.*, 993 F.Supp. 1258 (D. Minn. 1998) ("impaired property" and "business risk" exclusions applied to preclude coverage for losses caused by the failure of sealant manufacturer's products to perform as promised).

5. Liberty Mutual's actions were well-founded and there is no evidence of bad faith.

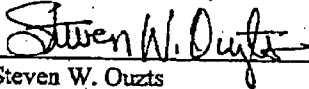
As demonstrated herein, Precision Walls' claim that Liberty acted unreasonably and in bad faith in violation of S.C. Code Ann. §38-59-40 is completely unfounded. There is no bad faith when an insurer has a reasonable basis upon which to contest a claim, as Liberty Mutual most certainly has in this instance. *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 645, 594 S.E.2d 455, 462 (2004). Furthermore, the actions of Liberty Mutual with respect to the claim of Precision Walls were entirely in compliance with the Policy, which renders moot any claim of bad faith. *See, Laidlaw Env. Services, Inc. v. Aetna Casualty & Surety Co. of Ill.*, 338 S.C. 43, 524 S.E.2d 847 (Cl. App. 1999) (bad faith claim rendered moot when insurer's decision comports with the policy).

CONCLUSION

It is an admitted fact that the brick veneer siding that was removed by SYS in order to replace the seal tape applied by Precision Walls on the underlying insulation board was not damaged by the loss of adhesion of the tape. The only reason for the removal of the brick veneer was to gain access to the non-compliant tape so that it could be replaced with a tape that complied with the specifications of Precision Wall's subcontract. According to well-established South Carolina law, such contractual liabilities are business risks that are the responsibility of the contractor, not the liability insurer. For all of the reasons explained herein, there is no coverage under the Policy for the losses claimed by Precision Walls. Liberty Mutual is entitled to summary judgment as a matter of law.

February 15, 2012

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STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

)
) IN THE COURT OF COMMON PLEAS
)

Precision Walls, Inc.,

) Case No.: 2011-CP-23-2028
)

Plaintiff,

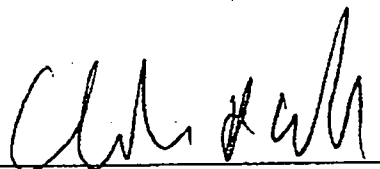
v.

) **PRECISION WALLS INC.'S MOTION**
) **FOR PARTIAL SUMMARY**
) **JUDGMENT**
)

Liberty Mutual Fire Insurance Co.,

Defendant.

Pursuant to Rule 56, SCRCP, Plaintiff Precision Walls, Inc. hereby moves for summary judgment on the first and second causes of action in its Amended Complaint. Based on the pleadings, affidavits, and deposition testimony submitted in support of this motion, there are no genuine issues of material fact as to the issue of insurance coverage for Plaintiff's claim and Plaintiff is entitled to judgment as a matter of law on these issues. Plaintiff's third cause of action for relief under S.C. Code Ann. § 38-59-40 involves contested issues of material fact and Plaintiff does not seek judgment on that cause of action in this motion. In support of this motion, Plaintiff submits the affidavit of D.J. Doherty, III and the deposition of Jonathan Williams, filed herewith. The deposition of Kevin Howell is already on file.



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Counsel for Plaintiff

April 9, 2012

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

)
) IN THE COURT OF COMMON PLEAS
)

Precision Walls, Inc.,

) Case No.: 2011-CP-23-2028
)

Plaintiff,

) **MEMORANDUM IN SUPPORT OF**
) **PRECISION WALLS' MOTION FOR**
) **PARTIAL SUMMARY JUDGMENT**
) **AND IN OPPOSITION TO LIBERTY**
) **MUTUAL'S MOTION FOR**
) **SUMMARY JUDGMENT**
)

v.

Liberty Mutual Fire Insurance Co.,

Defendant.

For the reasons set forth herein, the Court should grant Precision Walls Inc.'s motion for partial summary judgment and deny Liberty Mutual Fire Insurance Co.'s motion for summary judgment.

STATEMENT OF FACTS

The Loss

Precision Walls was a subcontractor to the general contractor, SYS Constructors, Inc., on a project in Easley, South Carolina known as Tri-County Tech Occupational Building (the "Project"). Precision Walls' scope of work included installing light gauge metal framing, building insulation, and "taped & sealed blue board insulation on exterior." [Affidavit of D.J. Doherty, III, ¶ 5, Ex.1]

Precision Walls made submittals for review by SYS Constructors and the project architect relative to certain materials to be used by Precision Walls in the performance of its work. One of the submittals by Precision Walls related to the proposed use of a "Seam & Seal" Tape manufactured by Berry Plastics for use in taping and sealing the joints of the blue board insulation. This submittal was reviewed by the architect for the

Project and SYS Constructors without objection and Precision Walls proceeded with taping the insulation joints with the "Seam & Seal" tape. [Doherty Aff. ¶ 6, Ex. 2]

The exterior wall for the Project was brick veneer. SYS Constructors subcontracted with Pride Masonry to provide the labor and materials needed to construct the brick veneer wall. [Doherty Aff. ¶ 7] Before the brick veneer wall could be constructed, Precision Walls had to install the blue board insulation and tape and seal each of the joints of the insulation boards. Each insulation board is approximately 4 feet by 8 feet in size which required significant taping and sealing of joints. Precision Walls had nothing to do with the construction of the brick veneer wall, which could only be constructed after Precision Walls had finished its work of installing, taping and sealing the insulation boards. [Doherty Aff. ¶ 8]

Prior to the completion of the brick veneer wall, SYS Constructors' field personnel observed that some of the tape sealing the joints at the insulation board was losing adhesion and coming loose. Upon further investigation by SYS Constructors, it was observed that tape was also coming loose in areas which were covered by the brick veneer wall. The investigation conducted by SYS Constructors did not determine the reason why the tape was coming loose. [Doherty Aff. ¶ 9] Further, while Precision Walls did not know why the tape was losing adhesion and coming loose, it believed the problem to be a defect in the tape itself rather than its own workmanship. [Deposition of Kevin Howell at p. 50, lines 1-25, P. 51 Lines 1-4.]

Taped insulation joints were essential to the integrity of the building envelope and were a requirement for preventing air and moisture intrusion into the interior of the building, among others things. Both the Owner of the Project and SYS Constructors

were unwilling to allow unsealed joints to remain behind the brick veneer wall. Accordingly, SYS Constructors directed Precision Walls to comply with its subcontract requirements and provide taped and sealed joints at all locations. [Doherty Aff. ¶ 10, Ex. 3.]

The only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick. SYS Constructors engaged its masonry subcontractor to remove the brick veneer wall in place and then build a new wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape. [Doherty Aff. ¶ 11, Exs. 4, 5 and 6.] In addition to costs incurred by its masonry subcontractor, SYS Constructors also incurred additional overhead costs and expenses including additional supervision and project management time dealing with and addressing the issues associated with the tape problem. SYS Constructors compiled all of the costs associated with the tape problem and issued a deductive change order to the Precision Walls subcontract. The original change order prepared by SYS Constructors was in the amount of \$108,845.00. Through negotiations with Precision Walls, SYS Constructors agreed to reduce the amount to \$97,500.00. A final deductive change order in that amount was issued to Precision Walls on or about November 15, 2011. [Doherty Aff. ¶ 12, Ex. 7.]

While Precision Walls incurred substantial costs of its own in removing and replacing the defective joint tape, those costs are not a part of the SYS deductive change order. Further, Precision Walls is not seeking indemnity for these costs from Liberty Mutual as Precision Walls recognizes those costs are not covered losses under the CGL policy.

The Claim

Precision Walls gave notice of its claim under its Commercial General Liability Policy to Liberty Mutual on February 15, 2010. [Deposition of Jonathan "JJ" Williams, p. 20, lines 19-22; Ex. 1(pages 40-42)] This notice was given before any of the brick veneer wall was removed. [Williams Depo., Ex. 1 (page 37); Howell Depo. p. 65, lines 22 -25; p. 66, lines 1-2] Liberty Mutual did not choose to send an adjuster or claims investigator to the site for an inspection at any time before or during the demolition or re-building of the brick veneer wall. [Williams Depo. p. 34, lines 18-25; p. 35, lines 1-13] After giving notice of its claim for indemnity under the CGL policy, Precision Walls provided additional information to Liberty Mutual including the subcontract with SYS Constructors and photographs of the jobsite conditions. [Williams Depo. Ex. 1 (pages 31-39)] For reasons unknown to Precision Walls, Liberty Mutual's claims adjusters somehow misunderstood the underlying events and were under the incorrect belief that the loss of adhesion of the Seam & Seal tape was causing the brick veneer to pull away from the building and some brick to fall off the wall. [Williams Depo. Ex. 1(pages 34-39)]

On April 5, 2010, Liberty Mutual sent Precision Walls a letter acknowledging receipt of the claim made approximately six weeks prior. In the letter, Liberty Mutual stated "we have determined that there is a potential of coverage for the claim under the policy" and that Liberty Mutual would "investigate the claim subject to the following reservation of rights." [Williams Depo. Ex. 5] The next letter that Precision Walls received from Liberty Mutual with respect to the claim was sent over seven months later on November 19, 2010. In that letter, Liberty Mutual advised Precision Walls that "we

have determined that the claim is not covered under the policy." [Williams Depo. Ex. 9] While the letter was signed by J.J. Williams, the Liberty Mutual claims adjuster assigned to handle the claim, Williams admits that he did not write the letter and did not know who drafted the letter. [Williams Depo., p. 64, lines 17-25]

Liberty Mutual's adjuster, JJ Williams, acknowledged that he had no experience with construction claims like the claim of Precision Walls prior to being assigned the claim. [Williams Depo. p. 12 lines 3-20]. Williams also acknowledged that it is important for a claims adjuster to promptly investigate the underlying facts of a claim so that the adjuster understands the basis for the claim soon after the claim is made. [Williams Depo. p. 10, lines 6-25, p. 11, lines 1-25; p. 13, lines 1-2] However, in this instance, it was not until October 25, 2010 that Williams finally understood that the loss of adhesion of the tape was not causing bricks to come loose and fall from the brick veneer wall. [Williams Depo p. 32, lines 9-15] Nonetheless, in the preceding six months, while operating with an incorrect understanding of the essential facts, Williams purported to "tender" the Precision Walls claim to Berry Plastics, the manufacturer of the Seam & Seal tape, on May 21, 2010. [Williams Depo. Exs. 6 & 7]

From May of 2010 until late October of 2010, Williams engaged in efforts to have Berry Plastics and its liability insurer, Chubb, accept responsibility for Precision Walls' claim. [Williams Depo. Exs. 6, 7 & 8] On November 11, 2010, Chubb sent Williams a letter in which Chubb denied the claim tendered by JJ Williams purportedly on behalf of Precision Walls. [Williams Depo. Ex. 8] Eight days after receiving the denial letter from Chubb, Liberty Mutual issued its letter to Precision Walls denying Precision Walls' claim for indemnification of its loss under the CGL Policy. [Williams Depo. Ex. 9]

SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate where there are no genuine issues of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. The purpose of summary judgment is to expedite the disposition of cases which do not require the services of a fact finder. *Gauld v. O'Shaughnessy Realty Co.*, 380 S.C. 548, 558, 671 S.E.2d 79, 85 (Ct. App. 2008). The party seeking summary judgment has the burden of clearly establishing the absence of a genuine issue of material fact. *Id.* Once the party moving for summary judgment meets the initial burden of showing the absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. *Id.* at 558-59, 671 S.E.2d at 85. Rather, the nonmoving party must present specific facts showing a genuine issue for trial. *Id.* at 559, 671 S.E.2d at 85. In determining whether any triable issues of fact exist, the evidence and all inferences that reasonably can be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Hansson v. Scalise Builders of S.C.*, 374 S.C. 352, 355, 650 S.E.2d 68, 70 (2007). In cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-S. Mgmt. Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

LEGAL ANALYSIS AND ARGUMENT

This matter involves the construction and interpretation of a Commercial General Liability insurance policy ("CGL Policy") under which Precision Walls is the insured and Liberty Mutual is the insurer. Insurance policies are subject to general rules of contract

construction. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 370 (1994). The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* An insurer's obligation under a policy of insurance is defined by the terms of the policy itself and cannot be enlarged by judicial construction. *South Carolina Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E.2d 471, 474 (Ct. App. 1990). Terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. *Standard Fire Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 461-62 (1990) (citations omitted). "Moreover, if the intention of the parties is clear, courts have no authority to change insurance contracts in any particular or to interpolate a condition or stipulation not contemplated either by the law or by the contract between the parties." *Id.*

The burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract while the insurer bears the burden of establishing exclusions to coverage. *Sunex Int'l, Inc. v. Travelers Indem. Co. of Ill.*, 185 F. Supp. 2d 614, 617 (D.S.C. 2001)(citations omitted). Exclusions in an insurance policy are always construed most strongly against the insurer. *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 464, 252 S.E.2d 565, 568 (1979). With these principles in mind, the Court is called upon by the parties in this matter to construe and interpret the CGL Policy at issue here.

PRECISION WALLS' LOSS IS A COVERED CLAIM UNDER THE CGL POLICY

I. The requirements of the insuring agreement are met.

Precision Walls has the burden of establishing that the facts satisfy the requirement of the CGL Policy's Insuring Agreement which states, in relevant part, as follows:

1. Insuring Agreement

a. [Liberty Mutual] will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .

...

b. This insurance applies to "bodily injury" and "property damage" only if:

(1) The "bodily injury" or "property damage" is caused by an "occurrence" that takes place in the "coverage territory"¹; . . .

[Liberty Mutual Ex. 1 at Section I—Coverages].

A. The undisputed facts establish that Precision Walls was legally obligated to pay damages to SYS Constructors.

The undisputed facts establish the following: (1) Precision Walls was contractually obligated to SYS Constructors to provide taped and sealed joints at the exterior insulation board; (2) SYS Constructors required Precision Walls to remedy the deficiency with respect to the joints where the tape lost adhesion; (3) the brick veneer wall had to be removed in certain places to allow access to replace the defective tape;

¹ There is no dispute that the events involved took place in the "coverage territory".

(4) SYS Constructors incurred costs of \$97,500.00 in removing and replacing the brick veneer wall; and (5) Precision Walls was contractually obligated to indemnify SYS Constructors from any loss or damage arising out of Precision Walls' work. [See Doherty Aff. *supra*] Therefore, it is clear that Precision Walls was legally obligated to pay the sum of \$97,500.00 to SYS Constructors. Indeed, Liberty Mutual does not contest this component of the insuring agreement in its pleadings or motion for summary judgment.

B. The undisputed facts establish the existence of "property damage."

The CGL policy defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property. . . ." [Liberty Mutual Ex. 1 at Section V.-Definitions, part 17.a] Applying the plain meaning of the policy definition to the facts in this instance, there is property damage. A brick wall (tangible property) was torn down (physical injury). Moreover, the contractor, SYS Constructors, and the Project owner lost the use of an otherwise functioning brick veneer wall. Therefore, the policy definition is satisfied by the undisputed facts of this case.

Rather than perform the simple analysis above, Liberty Mutual engages in a wandering review of court opinions from a number of jurisdictions in support of its argument that "property damage" does not exist. Liberty Mutual further confuses the issue by citing a number of cases dealing with whether diminution in value of property alone, without any accompanying physical injury, constitutes property damage. See *e.g. Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003). While a number of these cases decided that diminution in value without

physical injury did not constitute property damage, that analysis is irrelevant and of no help to the Court in this instance. Precision Walls' loss is not based on diminution in value. It is based on physical injury to tangible property.

The issue of insurance coverage for construction defects has received considerable attention from South Carolina's appellate courts over the last number of years. The most instructive place for this Court to receive guidance is the most recent case of *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). After reviewing its treatment of insurance coverage for construction claims in prior opinions, the South Carolina Supreme Court stated as follows:

In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute "property damage," but the defective construction would not.

Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co., 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011). This clarification is particularly instructive in this case. While the issue here is defective construction, rather than negligent construction, it is clear that Precision Walls' claim seeks coverage for damage to other, non-defective components (i.e. the brick veneer wall) and not the defective construction itself (i.e. the joint tape). No part of Precision Walls' claim involves its own costs in removing and replacing the defective joint tape.

Moreover, in *L-J II*, the South Carolina Supreme Court stated that "[t]he CGL policy may, however, provide coverage in cases where faulty workmanship causes a third party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone.*" *L-J, Inc. v. Bituminous Fire & Marine*

Ins. Co., 366 S.C. 117, 123, 621 S.E.2d 33, 36, fn 4 (2005)(emphasis in original). Therefore, it is clear that under South Carolina law, CGL policies may provide coverage when defective or faulty workmanship causes third-party property damage.

In its argument against a finding of "property damage," Liberty Mutual erroneously characterizes Precision Walls' claim as seeking recovery for repairing defective construction (i.e. removing and replacing the defective tape) and then cites *Crossman* in support of its claim that such is not "property damage" under the standard CGL policy. But it is clear that Precision Walls' claim is not for the repair of defective construction. Rather, it is for the costs related to damage to non-defective components (i.e. third-party property damage) which the South Carolina Supreme Court, both in *L-J II* and *Crossman*, has made clear may constitute property damage.

C. The undisputed facts establish the existence of an "occurrence."

The CGL policy defines "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." [Liberty Mutual Ex. 1 at Section V.-Definitions, part 13] The policy does not define the term "accident." South Carolina courts have previously defined "accident" as "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm." *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 379 S.C. 573, 578, 666 S.E.2d 897, 900 (2008). In the context of insurance contracts, Black's Law Dictionary, Sixth Addition (1990), defines "accident" as an "event happening without any human agency, or if happening through such agency, an event which, under circumstances, is unusual and not expected by the person to whom it happens . . . an unexpected happening without intention or design."

Under the undisputed facts of this case, it is clear that the loss of adhesion of the tape was an accident. The Berry Plastics Seam & Seal tape was approved for use in taping the insulation board joints and there is no evidence that the tape was applied improperly. Neither SYS Constructors nor Precision Walls knows why the tape lost its adhesion and came loose. These events fall squarely within the accepted definition of the word "accident" and establish that an "occurrence" has taken place for purposes of satisfying this element of the insuring agreement.

While this is not a case involving faulty workmanship, even if it were, there would be an occurrence in this instance. Newly enacted S.C. Code Ann. § 38-61-70 (B) provides as follows:

Commercial general liability insurance policies shall contain or be deemed to contain a definition of "occurrence" that includes:

- (1) an accident, including continuous or repeated exposure to substantially the same general harmful conditions; and
- (2) **property damage or bodily injury resulting from faulty workmanship**, exclusive of the faulty workmanship itself.

(emphasis added)

Thus, even if Precision Walls had somehow installed the joint tape in such a manner as for its workmanship to be found faulty, there would still be an occurrence under this statute.

As it did in the case of analyzing "property damage," Liberty Mutual declines to engage in a straightforward construction of the policy term "occurrence" and instead again mischaracterizes Precision Walls' claim as one seeking coverage for repairing Precision Walls' own "defective work." As set forth above, the claim is for losses arising

from third-party property damage that Precision Walls was legally obligated to pay to SYS Constructors. It does not include Precision Walls' own costs for removing and replacing the defective tape.

Liberty Mutual also attempts to shift the focus of inquiry as to what constituted the "accident." Liberty Mutual argues that the decision to tear down the brick wall was voluntary and, therefore, could not be an accident. Liberty Mutual fundamentally misconstrues the events constituting the accident. The tape coming loose was the accident. It was the triggering event setting in motion the chain of events resulting in the need to tear down the brick veneer wall. Liberty Mutual further mischaracterizes the nature of the decision to tear down the wall. Without any support to its claim, Liberty Mutual contends this decision was voluntary and implies that other options were available. Such was not the case. The decision was required and necessary in order to achieve the specified construction of the building system. [See Doherty Aff. *supra*]

D. The undisputed facts establish that the "property damage" was caused by the "occurrence."

As set forth in the Insuring Agreement of the CGL Policy, the occurrence must be the cause of the property damage in order for coverage to exist. In South Carolina, the standard for causation with respect to insurance coverage is a "but for" analysis. See *South Carolina Farm Bureau Mut. Ins. Co. v. Durham*, 380 S.C. 506, 511, 671 S.E.2d 610, 613 (2009). In *Durham*, the South Carolina Supreme Court recognized that "[c]ause' in the context of an insurance policy . . . is not the same as legal causation." *Id.* (citing 7 Couch on Ins. § 101:40). In the context of insurance policies, ". . . when a peril insured against sets other causes in motion which, in an unbroken sequence

between the causative act and the final injury, produce the final result for which the insured seeks recovery, the peril insured against will be regarded as the proximate cause of the entire loss." 7 Couch on Ins. § 101.44. Moreover, "there should be coverage in a situation in which a covered cause is a substantial or predominant factor in producing the damage or injury, even though it was not the last act in a chain of events, nor was it the triggering cause, and even though an excluded cause may have contributed in some form to the ultimate result and, standing alone, would have properly invoked the exclusion contained in the policy." 43 Am. Jur. 2d *Insurance* § 480.

Applying the above causation analysis to the facts in this case, it is clear that the "occurrence" (the tape losing adhesion and coming loose) was the "but for" cause of the "property damage" (tearing down the brick veneer wall). The loss of adhesion of the tape was the triggering event that set the chain of events in motion leading to the need to remove the brick wall. "But for" the tape coming loose, the brick wall would not have been torn down.

II. None of the exclusions to coverage apply in this instance.

Once the elements of the Insuring Agreement are met, the insurer bears the burden to establish that one or more policy exclusions apply to deny coverage. Liberty Mutual submits that the "Damage to Property" exclusion and the "Impaired Property" exclusion both apply to defeat coverage. For the reasons set forth below, it is clear that none of these exclusions apply to Precision Walls' claim.

A. The "Damage to Property" Exclusion (j5 and j6) does not apply.

The exclusions referred to by Liberty Mutual as the "Damage to Property" exclusions, state as follows:

2. Exclusions

This insurance does not apply to:

j. Damage to Property

"Property Damage" to:

(5) that particular part of real property on which you or any contractors or subcontractors working directly or indirectly on your behalf are performing operations, if the "property damage" arises out of those operations; or

(6) that particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it.

[Liberty Mutual Ex. 1—Section I—Coverages, part 2—Exclusions-subpart j]

In its argument relating to the applicability of the "Damage to Property" exclusion, Liberty Mutual does not even attempt to apply the facts of this case to the exclusion because to do so readily demonstrates that this exclusion has no applicability to Precision Walls' claim. In order for paragraphs j(5) or j(6) to bar coverage, the insured must be performing its work on **that particular part** of the property to which damage has occurred. In this case, the property that suffered damage and required restoration was the brick veneer wall. Because the brick veneer wall was constructed **after** Precision Walls installed the exterior insulation board and applied Seam and Seal tape to the joints, Precision Walls performed no work on the brick veneer wall itself. [Doherty Aff.] Therefore, because Precision Walls performed no work on that particular part of real property that was damaged, the "Damage to Property" exclusion cannot apply.

B. The "Impaired Property" Exclusion (m) does not apply.

This exclusion applies only to "property damage" to "impaired property." The key analysis as to this exclusion is whether the brick veneer wall meets the policy definition of "impaired property." It does not. The policy defines "impaired property" as follows:

8. "Impaired Property" means tangible property, other than "your product" or "your work" that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement.

[Liberty Mutual Ex. 1 Section I—Coverages, part 2—Exclusions-subpart m (emphasis added)]

The relevant inquiry becomes whether the brick veneer wall could be restored to use by the repair of the defective tape. If so, then it could be "impaired property". If not, then it cannot be "impaired property." Clearly, the brick veneer wall could not be restored to use by Precision Walls' removing and re-applying the joint sealing tape. It had to be rebuilt after such work was done by Precision Walls. Accordingly, there is no "impaired property" under the facts of this case and this exclusion does not apply.

In its argument, Liberty Mutual erroneously states that Precision Walls contends that the usefulness of the brick veneer wall was impaired because it incorporated defective work not in compliance with Precision Walls' subcontract requirements. Precision Walls has made no such claim with respect to the brick veneer wall. As far as

Precision Walls' knew, the brick veneer wall was perfectly fine. Moreover, Precision Walls never contended that the brick veneer wall incorporated its work. For reasons that cannot be adequately explained, Liberty Mutual incorrectly thought that the Seam and Seal tape was part of the brick veneer wall. But that was Liberty Mutual's misunderstanding, not a claim made by Precision Walls.

In similar fashion, Liberty Mutual erroneously claims that Precision Walls contends that the brick veneer wall was restored by the repair of the defective tape. Precision Walls has made no such claim. To the contrary, Precision Walls has always maintained the obvious--that the brick veneer wall could not be restored by the repair of the defective tape. It had to be rebuilt.

With respect to the applicability of the "Impaired Property" exclusion, Liberty Mutual's argument is based on statements that it created out of whole cloth. An insurer cannot meet its burden of proof on a policy exclusion by making up facts that do not exist.

3. Material issues of fact exist as to whether the actions of Liberty Mutual violate S.C. Code Ann. § 38-59-40 thereby precluding summary judgment on this issue.

Without any support for its claim, Liberty Mutual contends that Precision Walls' claim under S.C. Code Ann. § 38-59-40 is unfounded. This statute provides for the recovery of attorney's fees when a claim has been unreasonably denied. The relevant part of the statute reads as follows:

(1) in the event of a claim, loss, or damage which is covered by a policy of insurance . . . and the refusal of the insurer . . . to pay the claim within ninety days after a demand has been made by the holder of the policy or

contract and a finding on suit of the contract made by the trial judge that the refusal was without reasonable cause or in bad faith, the insurer, plan, or corporation is liable to pay the holder, in addition to any sum or any amount otherwise recoverable, all reasonable attorneys' fees for the prosecution of the case against the insurer

Liberty Mutual seeks summary judgment on this issue on the basis that there is no evidence to support Precision Walls' claim for relief under § 38-59-40. In order to prevail on its motion, Liberty Mutual must show that there is no genuine issue of material fact. This burden is on Liberty Mutual and they have offered no support for this claim by affidavit or otherwise. Nevertheless, reviewing the evidence in the light most favorable to Precision Walls, it is clear that there are facts, and reasonable inferences from same, which support the claim. Among those are the following:

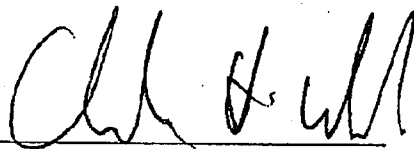
- a. Liberty Mutual assigned an adjuster to the claim with no prior experience in claims of this nature and limited knowledge of construction;
- b. Liberty Mutual's adjuster failed to properly review the material and information provided by Precision Walls and mistakenly concluded the joint tape was causing the brick veneer wall to fall down;
- c. Liberty Mutual undertook subrogation efforts with respect to tendering the claim to Berry Plastics before accepting coverage (and thereby gaining subrogation rights) all while operating with an incomplete and inaccurate understanding of the facts;
- d. It took Liberty Mutual some seven months to finally gain a full understanding of the underlying facts of the claim despite Liberty Mutual acknowledging the importance of doing so in a quick and prompt manner;
- e. Liberty Mutual engaged in a protracted analysis of coverage, attempted to shift responsibility for the claim to Berry Plastics, and then did not deny the claim on the CGL Policy by Precision Walls until one week after Liberty Mutual was advised that its tender of the claim to Berry Plastics (and its liability insurer) was denied.

[See Williams Depo. *supra*]

The trial court could reasonably conclude that the above actions and conduct of Liberty Mutual, both independently and collectively, demonstrate that the refusal to cover the claim was made unreasonably or in bad faith. Certainly, there are contested issues of material fact precluding summary judgment on this issue.

CONCLUSION

Applying a straightforward analysis of the undisputed facts to the plain policy terms establishes coverage under the CGL Policy Insuring Agreement. Moreover, using the same analysis, it is clear that no policy exclusions apply to remove coverage. Therefore, Precision Walls is entitled to summary judgment in its favor as to the issue of coverage under the CGL Policy. Because there are genuine issues of material fact as to Precision Walls' claim for relief under S.C. Code Ann. § 38-59-40, summary judgment is not appropriate as to this claim.



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April 9, 2012

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	CASE NO.: 2011-CP-23-2028
Precision Walls, Inc.	)	
	)	MEMORANDUM OF LIBERTY MUTUAL
Plaintiff,	)	FIRE INSURANCE COMPANY IN
vs.	)	OPPOSITION TO MOTION OF PRECISION
Liberty Mutual Fire Insurance Co.,	)	WALLS FOR PARTIAL SUMMARY
	)	JUDGMENT
Defendant.	)	

Liberty Mutual Fire Insurance Company ("Liberty Mutual") submits this memorandum in opposition to the Motion for Partial Summary Judgment served by Precision Walls, Inc. on April 10, 2012. This memorandum supplements the motion for summary judgment and incorporated memorandum previously filed by Liberty Mutual on February 20, 2012, which is incorporated herein by reference, and will serve as a reply to Precision Walls' motion.

Precision Walls' motion rests on the errant notion that the method of repair chosen by the person making a claim against the insured for a loss under a Commercial General Liability ("CGL") policy determines whether or not the loss is "property damage" as defined in the Policy. Precision Walls admits the costs of removing and replacing the joint tape it installed on the insulation boards within the exterior wall are not covered losses under the CGL Policy.¹ It also admits the defective joint tape caused no physical injury to the brick veneer.² Thus, given the state or condition of the wall existing before any repair, Precision Walls must admit there was no

¹ Page 3 of Precision Walls' Motion for Partial Summary Judgment states, in pertinent part, as follows: "While Precision Walls incurred substantial costs of its own in removing and replacing the defective joint tape, these costs are not part of the SYS deductive change order. Further, Precision Walls is not seeking indemnity for these costs from Liberty Mutual as Precision Walls recognizes those costs are not covered losses under the CGL policy."

² See the discussion and references to the deposition of Kevin Howell at page 3 of Liberty Mutual's Motion for Summary Judgment.

covered loss. The question presented, therefore, is whether or not the repair required by the general contractor, SYS Constructors, in order to bring the construction into compliance with contractual specifications, creates coverage where none would exist otherwise.

Courts around the country that have considered the same argument as Precision Walls³ in like circumstances have rejected it in unequivocal terms. See, e.g. *New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696, 701 (9th Cir. 1999) ("The nature of repairs cannot create coverage where none exists"). *Vieira* and other similar cases on point are discussed at length in Liberty Mutual's Motion for Summary Judgment at pages 7-9. Precision Walls offers no rebuttal of this authority.

At the heart of the matter is the widely held principle that economic loss caused by the failure of a contractor to fulfill contractual obligations does not constitute "physical injury to tangible property," or "property damage" as defined under a CGL policy. It makes no difference whether the loss is measured by the cost of repair of the non-conforming construction or the resulting diminution in value of the property. *Vieira*, 930 F.2d at 701-02. A commercial general liability insurance policy is not a guarantee of the insured contractor's work. *L.J., Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005).

On this issue, South Carolina is in line with *Vieira* and other cases following the general rule that economic loss does not constitute "physical injury" or "property damage" within the meaning of CGL policies. See, *Auto Owners Ins. Co. v. Carl Brazzell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003) (Loss resulting from the presence of hazardous material on property is economic loss, not "property damage" defined as "physical injury to tangible property.")³

³ In support of its decision, the Supreme Court referenced with approval the case of *Federated Mut. Ins. Co. v. Concrete Units*, 363 N.W.2d 751 (Minn. 1985), one of the principal cases forming the basis of the decision of the Ninth Circuit Court of Appeals in *Vieira, supra*.

Furthermore, a repair that affects an element of construction that is not otherwise part of a covered loss does not bring the cost of the repair within the coverage of a CGL policy. *See, Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197-98, 684 S.E.2d 541, 546-47 (2009)(costs of removal and replacement of stucco otherwise excluded from coverage did not become a covered loss when removed in order to effect repairs of substrate damage). In the present case, the demolition of the brick veneer was purely incidental to the repair of a non-covered economic loss (i.e. the joint tape) and as such is not within the coverage of the GCL Policy.

Precision Walls' analysis of the causal relationship between the defective joint tape and the repair adds nothing to the resolution of the coverage questions here. The case referenced in its motion did not involve the interpretation of a CGL liability policy, but first-party, multiple peril property coverage under a homeowner insurance policy. *South Carolina Farm Bureau Mut. Ins. Co. v. Durham*, 380 S.C. 506, 671 S.E.2d 610 (2009). *Durham* provides no answer to the question here: whether or not the cost of corrective work performed during construction to bring a building into compliance with contract specifications constitutes "physical injury," or "property damage," or an "occurrence" under a CGL policy. Precision Walls confuses the cause of the loss (i.e. the use of defective joint tape) with the effect of the remedy. As the court held in *Vieira, supra* the remedy has no bearing on the question of whether or not the loss constituted "physical injury to tangible property."

Precision Walls does not move for summary judgment on its third cause of action, which alleges a claim for unreasonable or bad faith refusal to pay a claim under S.C. Code Ann. §38-59-40. Liberty Mutual's motion for summary judgment on this claim is based upon two grounds, either of which can be decided as a matter of law. First, there can be no bad faith when an insurer has a reasonable ground for contesting coverage. *Helena Chemical Co. v. Allianz*

Underwriters Ins. Co., 357 S.C. 631, 594 S.E.2d 455 (2004). Second, when an insurer's decision to deny coverage is found to comport with the policy, a claim of bad faith refusal to pay benefits is rendered moot. *Laidlaw Environmental Services, Inc. v. Aetna Cas. & Surety Co. of Illinois*, 338 S.C. 43, 524 S.E.2d 847 (Ct. App. 1999).

Precision Walls fails to address either of the grounds which form the basis of Liberty Mutual's motion, but takes the opportunity to criticize the manner in which Liberty Mutual handled the claim, leaving out many salient facts and giving a completely one-sided, misleading account. For a more accurate account, Liberty Mutual invites the court's attention to the deposition of Jonathan Williams, on file with the court, and his claim notes attached to the deposition as Exhibit 1. The evidence shows that Mr. Williams graduated from Clemson University in 2004 with a degree in economics, had more than six years of claims experience with Liberty Mutual, and handled the Precision Walls claim diligently, thoroughly, and correctly. Regardless of any dispute about the manner in which the claim was handled, it is undisputed that Liberty Mutual had a reasonable basis upon which to deny coverage and that the loss was not covered under the Policy. Therefore, Liberty Mutual is entitled to summary judgment on Precision Walls' third cause of action.

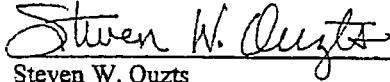
CONCLUSION

For all of the reasons stated herein and in its Motion for Summary Judgment with incorporated memorandum filed February 20, 2010, Liberty Mutual is entitled to summary judgment in its favor on each of the claims asserted by Precision Walls.

Respectfully submitted,

May 4, 2012

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	CASE NO.: 2011-CP-23-2028
Precision Walls, Inc.	)	
	)	MOTION AND SUPPLEMENTAL
Plaintiff,	)	MEMORANDUM OF LIBERTY MUTUAL
vs.	)	FIRE INSURANCE COMPANY FOR
	)	INVOLUNTARY DISMISSAL OF ACTION
Liberty Mutual Fire Insurance Co.,	)	UNDER SCRCP 41(b) AND ENTRY OF
	)	JUDGMENT UNDER SCRCP 52
Defendant.	)	

The Defendant Liberty Mutual Fire Insurance Company ("Liberty Mutual") hereby moves for involuntary dismissal of the Plaintiff's action pursuant to S.C. R. Civ. P. 41(b) based upon the agreed evidentiary record and applicable law because Plaintiff has shown no right to relief. Additionally and in the alternative, Liberty Mutual requests the entry of judgment in favor of Liberty Mutual on all claims or causes of action pursuant to S.C.R. Civ. P. 52. The background and support for this motion will be more fully explained below.

PROCEDURAL BACKGROUND AND AGREED EVIDENTIARY RECORD

This non-jury case first came before the court for a hearing on May 7, 2012 on cross-motions for summary judgment. Liberty Mutual's summary judgment motion and incorporated memorandum were filed February 20, 2012 based upon pleadings, depositions, answers to interrogatories, and admissions on file, together with exhibits identified and attached to the motion. Precision Walls followed suit with a motion for partial summary judgment filed on or about April 10, 2012 including additional evidence. Thereafter, on or about May 4, 2012, Liberty Mutual filed a memorandum in opposition to the motion of Precision Walls. On this record, the court conducted the May 7 hearing.

At the hearing, Precision Walls agreed to a dismissal, with prejudice, of the Third Cause of Action of its Amended Complaint, which alleged a statutory claim for attorney fees and costs

under S.C. Code Ann. §38-59-40, leaving only its claims for declaratory relief and breach of insurance contract. (Hearing Transcript, May 7, 2012, at pp. 3-4). With respect to Precision Walls' two remaining claims, both parties argued the material facts were undisputed, but they disagreed as to the proper interpretation and effect of the applicable law. In a written Form 4 order filed May 14, 2012, the court denied both motions for summary judgment on the grounds there are material questions of fact in dispute.

The case was then listed on a non-jury trial roster for a term set for September 4-7, 2012 before the Honorable Edward W. Miller. Before the commencement of the term, Liberty Mutual and Precision Walls reached an agreement to submit the case for decision based upon the same record and legal memoranda previously submitted with their summary judgment motions, except for Precision Walls' Third Cause of Action, which had been dismissed with prejudice. It was also agreed that any issues of fact regarding the remaining claims would be determined by the court, as the trier of fact, based upon the same evidence submitted on summary judgment. The court was informed of the parties' agreement by letter from the undersigned counsel to Judge Miller on August 23, 2012. The written assent of Precision Walls' counsel was indicated in his email of August 31, 2012. The referenced letter and email are attached to this motion as Exhibit A. As it turned out, the case was not reached for hearing during the September term and is now before this court for decision based upon the same record and stipulations.

In light of this procedural background and stipulated record, Liberty Mutual presents this motion based upon the same evidence previously submitted by the parties on summary judgment, which is on record with the court. Likewise, Liberty Mutual incorporates by reference the legal memoranda previously filed by Liberty Mutual in support of its motion for summary judgment and in opposition to the motion of Precision Walls.

In accord with the aforesaid stipulation, this motion is filed under SCRCP 41(b) and 52(a) which authorize the court, as the trier of fact, to determine the facts and render judgment. See, *Waterpointe I Property Owner's Ass'n, Inc. v. Paragon, Inc.*, 342 S.C. 454, 458, 536 S.E.2d 878, 880 (Ct. App. 2000) ("Rule 41(b) allows the judge as fact finder to weigh the evidence and determine the facts."). In addition, by agreement of counsel, Liberty Mutual supplements its motion and prior memoranda to address two recent cases pertinent to this case: *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012) and *Harleysville Mut. Ins. Co. v. State of South Carolina*, Op. No. 27189, Shearouse Advance Sheets (filed November 21, 2012). A copy of each opinion is attached to this motion for convenient reference as Exhibits B and C.

SUPPLEMENTAL LEGAL ANALYSIS AND ARGUMENT

1. Precision Walls' losses are not "property damage."

Walde v. Association Ins. Co., *supra*, gives an unequivocal answer to the question of whether or not the losses claimed by Precision Walls are "property damage." *Walde* held that the costs of a contractor's partial tear-down of a portion of a new barn and apartment building then under construction in order to bring the building into compliance with county zoning ordinances did not constitute "physical injury to tangible property" within the definition of "property damage" in a Commercial General Liability ("CGL") insurance policy. The word "injury," the court said, generally means the violation of another's legal right. *Walde*, at p. 89. The Court reasoned that the partial tear-down of the barn done at the direction of the owner for remedial purposes was not an "injury" as commonly understood because it was not a violation of another's legal right. *Id.* ("Johnson's partial tearing down of the barn's second story does not constitute an injury"). Consequently, the court held the costs incurred by the contractor for the

partial demolition of the barn were not for "physical injury to tangible property" and, therefore, not within the CGL policy coverage. *Id.* ("The Waldes' allegation that the barn had to be partially torn down to make it comply with Aiken's regulations does not raise the possibility of 'physical injury to tangible property.'")

Similarly, in this case, it is an admitted fact that the only "property damage" claimed by Precision Walls is the liability it incurred because of the tear-down and reconstruction of an otherwise undamaged brick veneer wall at the direction of the Project owner and general contractor for the remedial purpose of bringing the work of Precision Walls on the underlying insulation into compliance with subcontract specifications. For further substantiation of that fact, one need only read the Affidavit and related exhibits of the Project Manager, D.J. Doherty, III, presented by Precision Walls with its summary judgment motion.

Paragraph 5 of Mr. Doherty's Affidavit sets forth the scope of work of Precision Wall's subcontract, which, in part, required Precision Walls to provide "taped & sealed blue board insulation" on exterior wall framing. Paragraph 9 describes how it was determined prior to completion of a brick veneer wall covering the insulation that "some of the tape sealing the joints at the insulation board was losing adhesion and coming loose" and "that tape was also coming loose in areas which were covered up by the brick veneer wall." In paragraph 10, Mr. Doherty explains that "[b]oth the Owner of the Project and SYS Constructors were unwilling to allow unsealed joints to remain behind the brick veneer wall," and "[a]ccordingly, SYS Constructors directed Precision Walls, Inc. to comply with its subcontract requirements and provide taped and sealed joints at all locations." (emphasis added). Paragraph 11 explains that "[t]he only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick," and "SYS Constructors engaged its masonry contractor to remove the

brick veneer wall in place and then build a new brick veneer wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape." (emphasis added). Finally, as explained in paragraph 12 of the Doherty Affidavit and Exhibit 7 referenced therein, the deductive change order that is the basis for Precision Walls' claim is for the cost of the demolition and rebuilding of the brick veneer wall by the masonry subcontractor, including additional project management and supervision time associated with the masonry work, dumpster bills, and attorney fees, totaling \$97,500 after a cost reduction negotiated between SYS Constructors and Precision Walls.

The Insuring Agreement and definition of "Property Damage" contained in the Policy issued by Liberty Mutual to Precision Walls is identical to the same policy provisions at issue in *Walde*. Liberty Mutual's Policy¹ states, in pertinent part, as follows:

"1. Insuring Agreement

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . .
- b. This insurance applies to 'bodily injury' and 'property damage' only if:
 - (1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory';
 - (2) The 'bodily injury' or 'property damage' occurs during the policy period; and . . .

Walde leaves no doubt that South Carolina follows the same logic and reasoning as the other cases referenced in Liberty Mutual's summary judgment motion and memoranda, which

¹ A certified copy of the insurance policy issued by Liberty Mutual to Precision Walls is on record with the court as Exhibit 1 to Liberty Mutual's Motion for Summary Judgment. The Insuring Agreement is found in Section I, Coverages, part 1.

have consistently held the remediation of a defective product installed in a building it is not "physical injury to tangible property." According to *Walde* and the aforementioned authorities, there is no coverage for the claims of Precision Walls because the losses are not "property damage" as defined in the Liberty Mutual Policy.

2. Precision Walls' liability was not covered as "property damage" because of "loss of use of tangible property that is not physically injured."

In *Walde*, the court found the claimants had alleged a "possibility" of "property damage" within subpart "b" of the policy definition because of a "loss of use of tangible property that is not physically injured."² Specifically, the court pointed to allegations that the claimants were unable to make full use of their property after being informed of the barn's non-compliance with county ordinances. The court's analysis of this issue in *Walde* does not apply to this case for a number of reasons.

Unlike *Walde*, where the issue was whether or not the insurer had a duty to defend, the claim of Precision Walls here is for indemnity based upon a liability fixed by SYS Constructors' deductive change order for the cost of removing and replacing the brick veneer wall. See Affidavit of D.J. Doherty, discussed in section 1 above. Precision Walls has made no claim and presented no evidence of loss of use of tangible property that is not physically injured. That much is clear from Precision Walls' answer to Liberty Mutual's interrogatory requesting a "precise and detailed itemized description of all property damage" as defined in the Policy.

² *Walde* was concerned only with the issue of whether or not the insurer had a duty to defend, not whether it had a duty to indemnify. As the court pointed out, the duty to defend is determined by the allegations of the third-party's complaint. If the alleged facts create even "a possibility of coverage," the insurer is obligated to defend. Thus, the duty to defend is broader than the duty to indemnify. *Green Textile Assoc., Inc. v. Federal Ins. Co.*, 2006 U.S. Dist. LEXIS 40821 (D.S.C. June 16, 2006). By contrast, the duty to indemnify is based upon actual liability, not allegations or possibilities. *Id.*, quoting with approval, *Perdue Farms, Inc. v. Travelers Ins. Co. of America*, 448 F.3d 252, 257-58 (4th Cir. 2006) ("Duty to indemnify . . . refers to insurers responsibility to pay a monetary award when its insured has become liable for a covered claim.")

Precision Walls answered that “[t]earing down brick veneer wall is property damage – it is physical injury to tangible property.” (Plaintiff’s Answers to Defendant’s First Set of Interrogatories, No. 9).³ Precision Walls has maintained the same position throughout the course of this case, including its summary judgment memoranda, the Doherty affidavit, and exhibits discussed above in section 1. There simply is no claim, no evidence, and no liability by any measure for any “loss of use of tangible property that is not physically injured.” Therefore, there is no covered “property damage” as defined in subpart “b.”

3. The losses claimed by Precision Walls were not the result of an “occurrence.”

This court need not reach the issue of whether or not the losses claimed by Precision Walls resulted from an “occurrence” because Liberty Mutual has already shown there was no “property damage.” See, *Crossman Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 49, 717 S.E.2d 589, 594 (2011) (“[I]t is only after ‘property damage’ has been alleged that the question of ‘occurrence’ is reached.”). Even so, as shown in Liberty Mutual’s summary judgment motion, the undisputed facts show the losses claimed by Precision Walls were not the result of an “accident,” and, therefore, there was no “occurrence” as defined in the Policy.

Walde’s analysis of whether or not the claimants’ allegations of facts were sufficient to raise the possibility of an “occurrence” does not affect this case because the issues were different in *Walde* and were decided under the duty-to-defend standard, which, as discussed above at footnote 2, is different than the standard applicable to this case. Liberty Mutual’s arguments on the issue of whether or not the losses claimed by Precision Walls resulted from an “occurrence” are fully set forth in Liberty Mutual’s motion for summary judgment and supporting memoranda.

³ Precision Walls’ answers to Liberty Mutual’s interrogatories are on file with the court and attached as Exhibit 3 to Liberty Mutual’s motion for summary judgment.

Also on the "occurrence" issue, *Harleysville Mut. Ins. Co. v. State of South Carolina*, *supra* precludes Precision Walls' argument that an "occurrence" was established based upon the statutory definition set forth in S.C. Code Ann. § 38-61-70 (Supp. 2011). (See Memorandum in Support of Precision Walls' Motion for Partial Summary Judgment and In Opposition to Liberty Mutual's Motion for Summary Judgment, at p. 12). The court in *Harleysville* held unconstitutional the retroactivity clause of S.C. Code Ann. § 38-61-70 so that the statute applies only prospectively. The Liberty Mutual Policy at issue was issued September 30, 2009, prior to the effective date of the statute, which was May 17, 2011.

4. Coverage for the losses claimed by Precision Walls is excluded by the "Damage to Property" Exclusion.

Liberty Mutual argued in its summary judgment motion and memoranda that any losses of Precision Walls that may be found to be within the coverage of the insuring agreement, if any, are excluded by Exclusion 2(j)(6) of the Policy. In pertinent part, it excludes coverage for "property damage" to:

(6) That particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it."

Walde dispels any doubt about the applicability of exclusion 2(j)(6) to the claim of Precision Walls. Precision Walls argued in its summary judgment motion the exclusion does not apply because the work incorrectly performed by Precision Walls was on the insulation underneath the brick veneer, rather than the brick veneer itself. Liberty Mutual argued Precision Walls' position was contrary to South Carolina law, including *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2003), *overruled on other grounds by Crossman Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589,

594 (2011).⁴ Based upon *Century Indemnity*, the court held in *Walde* that an exclusion identical to 2(j)(6) "excluded coverage not only for (1) 'property damage' to defective work caused by that defective work but also (2) 'property damage' to non-defective work caused by the defective work." *Walde* confirms that any coverage for the claim of Precision Walls is excluded by 2(j)(6).

5. Coverage for the losses claimed by Precision Walls is excluded by exclusion 2(m) which applies to "property damage" to "impaired property" or property that has not been physically injured.

Exclusion 2(m) of the Policy excludes coverage for:

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or your work after it has been put to its intended use."

Exclusion 2(m) was not at issue in *Walde*. Liberty Mutual stands on the arguments presented in its motion for summary judgment and supporting memoranda, which are incorporated by reference.

CONCLUSION

Based upon the evidence and the law, Precision Walls has failed to show a right to relief and its action should be dismissed pursuant to SCRCP 41(b). Additionally, or in the alternative, the court, as the trier of the facts in this case, should enter judgment in favor of Liberty Mutual under SCRCP 52(b).

⁴ See Motion of Defendant Liberty Mutual Fire Insurance Company for Summary Judgment, at p. 12.

Respectfully submitted,

TURNER, PADGET, GRAHAM & LANEY, P.A.

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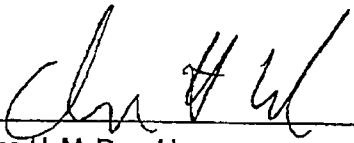
January 25, 2013

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
JAN 30 P 4 30

IN THE COURT OF COMMON PLEAS

Precision Walls, Inc.,	)	Case No.: 2011-CP-23-2028
	)	
Plaintiff,	)	
	)	
v.	)	PRECISION WALLS INC.'S MOTION
	)	FOR JUDGMENT AS A MATTER OF
Liberty Mutual Fire Insurance Co.,	)	LAW
	)	
Defendant.	)	

Pursuant to Rule 52, SCRCP, Plaintiff Precision Walls, Inc. hereby moves for judgment on the first and second causes of action in its Amended Complaint. Based on the pleadings, affidavits, and deposition testimony submitted in support of this motion, there are no genuine issues of material fact as to the issue of insurance coverage for Plaintiff's claim and Plaintiff is entitled to judgment as a matter of law on these issues. In support of this motion, Plaintiff submits the affidavit of D.J. Doherty, III, the deposition of Jonathan Williams, and the deposition of Kevin Howell all of which are already on file. Plaintiff further submits its supplemental interrogatory responses which are filed herewith.


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January 28, 2013

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS
STATE OF SOUTH CAROLINA)
COUNTY OF GREENVILLE 2011 JAN 30 P 4:30) IN THE COURT OF COMMON PLEAS

Precision Walls, Inc.,)
)
Plaintiff,)
)
v.) Plaintiff's Supplemental Answers to
) Defendant's First Set of
Liberty Mutual Fire Insurance Co.,) Interrogatories.
)
Defendant.)

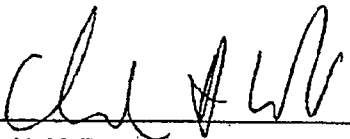
Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Plaintiff hereby answers the following interrogatories:

9. Provide a precise and detailed itemized description of all property damage that you contend was caused by an occurrence as those terms are used and defined in the Policy.

ANSWER:

Tearing down the brick veneer wall is property damage—it is physical injury to tangible property. In addition, there is resulting loss of use of that property (i.e. the brick veneer wall) because it has been demolished. Alternatively, there is property damage because there is loss of use of tangible property that is not physically injured. If tearing down the brick veneer wall does not constitute physical injury, there is still loss of use of tangible property (i.e. the brick veneer wall). Because the brick veneer wall was destroyed, the general contractor and the owner of the project lost the use of an otherwise acceptable brick veneer wall. The failure of Berry Plastics Seam and Seal tape (i.e. losing its adhesion to poly foam board insulation and coming loose) was an

accident. It was unexpected, unintended and an event outside of PWI's control. In order to re-tape the joints, the brick veneer wall had to be removed as there was no other feasible means of access to the wall cavity.



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January 28, 2013

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
AUL B. WICKENSIMER
STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE 2013 JAN 30 P 4:30 ..

Precision Walls, Inc.,	)	Case No.: 2011-CP-23-2028
	)	
Plaintiff,	)	PRECISION WALLS, INC.'S
	)	SUPPLEMENTAL MEMORANDUM
v.	)	IN SUPPORT OF ITS MOTION FOR
	)	JUDGMENT AS A MATTER OF LAW
Liberty Mutual Fire Insurance Co.,	)	AND IN OPPOSITION TO LIBERTY
	)	MUTUAL'S MOTION FOR
Defendant.	)	JUDGMENT AS A MATTER OF LAW

For the reasons set forth herein, as well as those set forth in Precision Walls' prior filed Memorandum in Support of Motion for Summary Judgment, the Court should find that the insurance policy at issue covers the claim of Precision Walls and that Precision Walls is entitled to judgment in its favor on all causes of action.

INTRODUCTION

Precision Walls agrees with the "Procedural Background and Agreed Evidentiary Record" set forth in Liberty Mutual's supplemental memorandum. The recent cases of *Walde v. Association Insurance Co.*, Op. No. 5061 Shearouse Advance Sheets (filed December 12, 2012), 2012 WL 6177947, and *Harleysville Mut. Ins. Co. v. State of South Carolina*, Op. No. 27189, Shearouse Advance Sheets (filed November 21, 2012), 2012 WL 5870799, have application to the issues in this case warranting supplementation of the parties' respective briefs. While Precision Walls will apply the reasoning of the court in *Walde* to the facts of this case, *Walde* is applicable only as to the inquiry on whether there is "property damage" as that term is defined under the insurance policy at issue. Contrary to the arguments advanced by Liberty Mutual,

Walde is simply not applicable to any of the other issues involved in the analysis of whether coverage exists under the applicable Commercial General Liability ("CGL") insurance policy at issue here.

ARGUMENT

I. The undisputed facts establish the existence of "property damage."

In *Walde, supra*, the South Carolina Court of Appeals addressed a situation somewhat similar to the facts of this case. The primary issue in *Walde* was whether the insurer had a duty to defend its insured against the claims asserted against the insured by the Waldes. *Walde*, at p. 85. However, in order to determine whether the duty to defend existed, the court had to engage in a coverage analysis focusing on whether the Waldes had made allegations which, if true, would constitute "property damage" under the terms of the applicable insurance policy. While certain facts of this case differ in material respects from those in *Walde*, the *Walde* opinion clearly supports Precision Walls' contention that "property damage" exists in this instance.

The key provisions of the policy at issue in *Walde* and the ones at issue in this case are the same standard policy definitions found in such CGL insurance policies. These CGL policies define "property damage" as the following:

- a. Physical injury to tangible property, including all resulting loss of use of that property. . . .;" or
- b. Loss of use of tangible property that is not physically injured. . . ."

[Liberty Mutual Ex. 1 at Section V.-Definitions, part 17] Therefore, there are two, distinct components to the "property damage" analysis.

a. Physical injury to tangible property, including all resulting loss of use

Unlike the situation in *Walde*, the facts of this case establish physical injury to tangible property. One of the key differences here is that the removal of the brick wall was not a remedial measure. There was nothing wrong with the brick veneer wall. It required no remediation. [Affidavit of D.J. Doherty at ¶¶ 9-12; Howell Dep., p. 65, l. 9-16] The remedial measures were removing and re-taping the insulation joints which was the work of Precision Walls and which forms no part of Precision Walls' claim under the CGL policy. Liberty Mutual seeks to expand the reach of remedial measures to the tearing down of the brick veneer wall. This is an overbroad application of the holding in *Walde* and contrary to the fundamental tenet that insurance contracts should be construed broadly in favor of coverage. See *Walde* at p. 86, quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). Not surprisingly, Liberty Mutual advances an argument that requires the Court to construe the policy language strictly so that no coverage exists.

Another key difference from the facts of *Walde* is that the tearing down of the brick veneer wall was third-party property damage involving the violation of another's legal right which the *Walde* court found was determinative of the existence of "physical injury." See *Walde* at p. 89. Precision Walls had nothing to do with the construction of the brick veneer wall. [Doherty Aff. at ¶¶ 7-8] The brick veneer wall was the property of SYS Constructors and the owner of the construction project and SYS Constructors

clearly had the right under its subcontract with Precision Walls to recover the costs of tearing down and rebuilding the brick veneer wall. [Doherty Aff. ¶ 10] Therefore, in this case, we have third party property damage for which the insured is legally responsible. Conversely, in *Walde*, the contractor partially tore down its own work product which was as a direct and necessary part of the remedial measures. The only damage was to the contractor's own work product done by the contractor himself. See *Walde* at p. 89.

b. **Loss of Use of Tangible Property that is Not Physically Injured**

In its Amended Complaint, Precision Walls alleges in paragraph 8 that "[t]his damage to the work and/or property of another constituted property damage caused by an occurrence as those terms are used and defined in [the] Policy." In its supplemental brief, Liberty Mutual contends that "loss of use of tangible property" is not an issue in this case as it relates to whether there is "property damage." As evidenced by the above allegation in its pleading, Precision Walls has alleged that property damage exists under the policy definition without limitation to subsection (a) where physical injury is involved. In addition, the very purpose of this memorandum is to supplement the record and arguments in light of the opinion in *Walde*. Just as Liberty Mutual has done, Precision Walls has the right to fully argue its position in light of this recent case and as supported by its Amended Complaint. In order to avoid any confusion and provide clarification, Precision Walls has served an amended interrogatory response upon Liberty Mutual clarifying that it claims "property" damage under subsection (a) or, alternatively, under subsection (b) of the policy definition.

While Precision Walls submits that in this case there is "physical injury to tangible property", it follows that if there is no "physical injury", as Liberty Mutual argues, there is most certainly "loss of use of tangible property that is not physically injured." It cannot be disputed that in this case there was loss of use of tangible property. SYS Constructors and the project owner lost the use of an otherwise functioning brick veneer wall. The existing wall was torn down and could not be used again until it was replaced. This constitutes "property damage" under subsection (b) of the policy definition.¹

Walde clearly illustrates that when the facts demonstrate loss of use of tangible property in the absence of physical injury, "property damage" exists under subsection (b) of the policy definition. *Walde*, pp. 89-90. If, as Liberty Mutual argues, there is no "physical injury" in this case, then per *Walde*, "property damage" exists under subsection (b) of the policy definition because there is loss of use of tangible property. Moreover, *Walde* makes it clear that the issue of whether the property damage was caused by the faulty or defective workmanship of the insured is not part of the analysis of whether there is "property damage." *Id.* at p. 90. Liberty Mutual contends that "*Walde* leaves no doubt that South Carolina follows the same logic and reasoning as the other cases cited in Liberty Mutual's summary judgment motion and memoranda, which have consistently held the remediation of a defective product installed in a building is not [property damage]." [Liberty Mutual Supp. Memo. at pp. 5-6] Not only is this an incorrect summary of the law, it is totally contradicted by the court in *Walde* which stated that "[under the plain language of the policy, whether 'property damage'

¹ "Loss of use" as it relates "property damage" necessarily involves a temporary loss rather than a permanent loss. See *Advanced Network, Inc. v. Peerless Ins. Co.*, 190 Cal.App.4th 1054 (2010).

was caused by faulty workmanship is relevant in the Policy's exclusions and not the definition of 'property damage.' *Walde* at p. 90 (emphasis added).

II. Precision Walls acknowledges that recently enacted S.C. Code Ann. § 38-61-70 does not apply in this case.

Subsequent to the filing of its memorandum in support of its motion for summary judgment, the South Carolina Supreme Court issued its opinion in *Harleysville Mut. Ins. Co. v. State of South Carolina*, Op. No. 27189, Shearouse Advance Sheets (filed November 21, 2012), 2012 WL 5870799. In that case, the Supreme Court held that the clause in S.C. Code Ann. § 38-61-70 making it retroactive to insurance policies issued before its enactment was unconstitutional. *Id.* While the remaining parts of the statute, including those provisions previously relied upon by Precision Walls, were found to be constitutional and valid, the applicable insurance policy in this case was issued before the enactment of the statute. Therefore, the statute does not apply to the coverage analysis here.

III. Nothing in *Walde* changes the analysis of whether the facts in this case establish an "occurrence" as defined by the policy.

In *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), the South Carolina Supreme Court shot down, once and for all, the favored argument of insurance carriers that faulty workmanship cannot constitute an "occurrence." The *Crossman* court said:

[t]his Court, among others, has struggled to discern the meaning of the expanded occurrence definition in the context of progressive damage cases. The lack of a clear meaning, we believe, leaves us with an ambiguity, which we must construe against the insurer. . . . Accordingly,

we construe the ambiguous definition of occurrence in favor of the insured

.....

Crossman, 395 S.C. at 47, 717 S.E.2d at 592-93. Nothing in *Walde* changes the analysis set forth in *Crossman* regarding whether there is an "occurrence." After *Crossman*, establishing an "occurrence" is rightfully a very low threshold for an insured to cross and it cannot be reasonably disputed that the facts of this case demonstrate an "occurrence." [Precision Walls' Memorandum in Supp. of Summary Judg. at pp. 11-13]

While Liberty Mutual relies heavily on *Walde* in its argument against coverage, it curiously seeks to distinguish *Walde* based on the fact that *Walde* was primarily dealing with the issue of the insurer's duty to defend rather than the duty to indemnify. While Precision Walls' thinks this distinction meaningless, Liberty Mutual seeks to selectively apply *Walde* only when it suits its argument. If the fact that *Walde* was decided under a "duty-to-defend standard" renders its analysis on certain coverage issues inapplicable to this case, as Liberty Mutual contends, then it should follow that the entire opinion is inapplicable since this case involves the insured's duty to indemnify. If Liberty Mutual is in for a penny with *Walde*, it's in for a pound and it cannot pick and choose when it applies and when it does not.

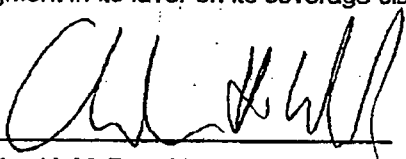
IV. *Walde* does not change the analysis for any policy exclusions: None of the exclusions to coverage apply in this instance.

Liberty Mutual argues that "*Walde* dispels any doubt about the applicability of exclusion 2(j)(6) to the claim of Precision Walls." [Liberty Mutual Supp. Memo. at pp. 5-6] This is simply not the case. *Walde* held that the "j. 6" policy exclusion applied to bar coverage because the property damage was to that particular part of the property on

which the insured incorrectly performed its work. *Walde*, pp. 92-94. In this instance, the damaged property (the brick veneer wall) was not part of Precision Walls' work; and, in fact, was installed after Precision Walls had already performed its relevant work. Therefore, Precision Walls obviously performed no work on the damaged property. Precision Walls refers the Court to its argument as to this issue in its prior filed memorandum. [Precision Walls' Memorandum in Supp. of Summary Judg. at pp.14-15]

CONCLUSION

While the recent opinion in *Walde* is instructive on the issue of "property damage," its reach simply does not extend to the other coverage issues and it should not be so applied. For the reasons set forth herein and in Precision Walls's memorandum in support of its motion for summary judgment, the undisputed facts of this case demonstrate that coverage exists under the applicable CGL policy. Accordingly, Precision Walls is entitled to judgment in its favor on its coverage claim.



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Counsel for Plaintiff Precision Walls, Inc.

January 29, 2013

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
PAUL B. WICKENS

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE

2013 MAR -4 P 1:39

Precision Walls, Inc.,
Plaintiff,
v.
Liberty Mutual Fire Insurance Co.,
Defendant.

IN THE COURT OF COMMON PLEAS
Case No.: 2011-CP-23-2028
**PRECISION WALLS INC.'S MOTION
FOR RECONSIDERATION**

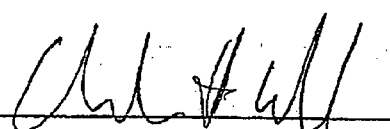
Pursuant to Rule 59(a), SCRCP, Plaintiff Precision Walls, Inc. hereby moves that the judgment entered by the Court in this matter on February 18, 2013, a copy of which is attached hereto, be opened; and that the Court make new findings and conclusions and direct the entry of judgment for the Plaintiff. Plaintiff received the Court's order on Friday, February 22, 2013.

The basis for this motion under Rule 59(a) is as follows:

The court erred as a matter of law by construing the insuring agreement narrowly against coverage rather than broadly in favor of coverage as it is required to do. *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). More specifically, the court erred by finding that no "occurrence" exists under the policy definition. Because the term "occurrence" has been found to be ambiguous, it must be construed against Liberty Mutual, the insurer, and in favor of Precision Walls as the insured. See *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). Under the undisputed facts of this case, the joint tape's loss of adhesion was an unexplained event and the very definition of "an accident." Next, if the court found that there was no "property damage" as that term is

defined in the insurance policy, then the court erred by so finding as the undisputed facts of this case established "physical injury to tangible property." Lastly, the court erred by finding that Exclusion 2(j)(6) of the policy applies and excludes coverage. Based on the undisputed facts of this case, the exclusion cannot apply because Precision Walls never performed any work on the brick veneer wall which is a threshold requirement for this exclusion.

Alternatively, Plaintiff Precision Walls, Inc. hereby moves pursuant to Rule 59(e), SCRPC, that the judgment in this matter be amended to include a specific finding by the trial court on the issue of whether "property damage" exists as that term is defined by the insurance policy at issue in this matter. Plaintiff cannot determine from the Court's order whether the court ruled on this issue; and, if so, whether the Court made a finding of whether property damage exists. Plaintiff further requests that the Court amend its judgment to set forth the basis for its finding that Exclusion 2(j)(6) applies to bar coverage.


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Counsel for Plaintiff

March 1, 2013

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

Precision Walls, Inc.

Plaintiff,

vs.

Liberty Mutual Fire Insurance Co.,

Defendant.

) IN THE COURT OF COMMON PLEAS

) CASE NO.: 2011-CP-23-2028

)
)
) **MEMORANDUM OF DEFENDANT IN**
) **OPPOSITION TO PRECISION WALLS,**
) **INC.'S MOTION FOR RECONSIDERATION**
)
)
)

Liberty Mutual Fire Insurance Company ("Liberty Mutual") submits this memorandum in opposition to the motion filed by Precision Walls, Inc. on March 4, 2013 seeking reconsideration of the judgment entered February 18, 2013 in favor of Liberty Mutual. The arguments made by Precision Walls in its motion are the same ones previously made by Precision Walls in its briefs and oral argument. The Court considered each of them and committed no error in its prior rulings on Precision Walls' claims. The judgment entered February 18, 2013 was correctly decided. Precision Walls' motion for reconsideration should be denied.

The primary basis asserted by Precision Walls in support of its motion for reconsideration is Rule 59(a), SCRPC. Rule 59(a)(2) provides that a new trial may be granted "in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in the courts of this state." Those reasons are not specified in the rule. Under the virtually identical federal rule, courts have held that "a motion for a new trial in a non-jury case . . . should be based upon manifest error of law or mistake of fact, and a judgment should not be set aside except for substantial reasons." *United States v. Carolina Eastern Chemical Company, Inc.*, 639 F. Supp. 1420, 1423 (D.S.C. 1986).

Precision Walls contends the Court erred in three ways: (1) by finding there was no "occurrence," (2) by finding there was no "property damage" due to "physical injury to tangible property," and (3) by finding that coverage is excluded under Policy Exclusion 2(j)(6). Precision Walls is wrong on all three arguments, as this Court has already found. The Court was correct in its analysis and rulings.

Precision Walls misconstrues *Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 ((2011)). It does not fit the facts of this case, as previously shown by Liberty Mutual in its motion for summary judgment and incorporated memorandum at pages 9-10. *Crossman* involved progressive damage to property caused by water leaking into a building over time and, therefore, implicated the expanded definition of "occurrence" relating to "continuous or repeated exposure to substantially the same harmful conditions." It was in this context that the Court said, "[t]his Court, among others, has struggled to discern the meaning of the expanded occurrence definition *in the context of progressive damage cases.*" *Crossman*, 395 S.C. at 47, 717 S.E.2d at 592-93 (emphasis added).

Unlike *Crossman*, Precision Walls' claim is not for progressive damage, but for economic loss incurred for replacement of defective insulation tape installed by Precision Walls. The defective tape did not damage any other property, but had to be replaced because it did not meet the specifications of Precision Walls' subcontract. In such circumstances, the South Carolina Supreme Court has not wavered from well-established precedent holding that faulty work is not an "occurrence" where the claim is for money damages to compensate for repairing the defective work. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 124, 621 S.E.2d 33, 36 (2005). Correction of deficient work is not an accidental or unexpected event, but

rather an expected and intended consequence of a contractor's failure to meet contractual obligations. *Id.*

On the question of the meaning and effect of the term "property damage," *Crossman* emphasized that the cost of repairing or removing defective work is not covered "property damage" under a CGL insurance policy. *Crossman*, 395 S.C. at 48, 717 S.E.2d at 593. Likewise, in *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012), the South Carolina Court of Appeals made clear that the cost of tearing down and replacing construction that does not conform to legal requirements is not "physical injury to tangible property" within the CGL definition of "property damage." Precision Walls offers no authority to rebut this Court's finding, based upon *Walde*, that there is no coverage for Precision Walls' claim. The Court's ruling on this issue is the correct one.

Concerning the applicability of Exclusion 2(j)(6), Precision Walls expresses disagreement with this Court's ruling, but offers no authority for the contrary position advocated in its motion. The Court's ruling that coverage is excluded by Exclusion 2(j)(6) is supported by *Walde, supra*; *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2003), *overruled on other grounds by Crossman Cmty. of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011), and numerous other South Carolina authorities referenced in legal briefs previously submitted to the Court by Liberty Mutual. The Court was correct in its ruling. Precision Walls' motion should be denied.

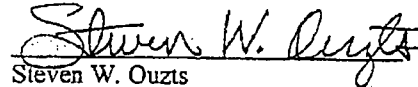
As an alternative motion, Precision Walls requests the Court to amend its judgment pursuant to Rule 59(e), SCRPC to include more specific findings regarding its rulings on the question of whether there was "property damage" as defined in the Policy and the applicability of Exclusion 2(j)(6) as a bar to coverage. The proposed formal order submitted to the Court by

Liberty Mutual's undersigned counsel on March 4 includes such specific findings in accordance with the February 18 judgment. Liberty Mutual has requested the entry of its proposed formal order. Otherwise, Liberty Mutual opposes the motion of Precision Walls, which should be denied for all of the reasons stated herein.

Respectfully submitted,

March 14, 2013

TURNER, PADGET, GRAHAM & LANEY, P.A.



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Attorneys for Liberty Mutual Fire Insurance Company

STATE OF SOUTH CAROLINA)

COUNTY OF GREENVILLE)

Precision Walls, Inc.,)

Plaintiff,)

v.)

Liberty Mutual Fire Insurance Co.,)

Defendant.)

IN THE COURT OF COMMON PLEAS

Case No.: 2011-CP-23-2028

AFFIDAVIT OF D.J. DOHERTY, III

2012 SEP 12 AM 10:51
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CLERK OF COURT
GREENVILLE, SC
JAMES W. WATKINS

Personally appeared before me, the undersigned, who does state the following under oath:

1. My name is D.J. Doherty, III. I am over the age of 18 years old. I am employed by SYS Constructors, Inc. as a Project Manager.
2. I make this affidavit in my capacity as a Project Manager with SYS Constructors and based upon my own personal knowledge.
3. SYS Constructors was the general contractor on a project for Tri County Technical College in Easley, South Carolina known as Tri-County Tech Occupational Building (the "Project"). I was the Project Manager for SYS Constructors on this Project.
4. As Project Manager, my duties included coordinating the work of any of SYS Constructors' subcontractors and to ensure compliance by such subcontractors with their subcontract with SYS Constructors.
5. SYS Constructors entered into a subcontract with Precision Walls, Inc. on the Project. A copy of the subcontract is attached hereto as Exhibit 1. The scope of work under the subcontract is set forth in Section 2 and includes the following:

Scope of work includes all material, labor, equipments and supervision of htge following: all light gauge metal framing of walls, roof trusses and decking, building insulation, densglass on exterior, **taped & sealed blue board insulation** on exterior, installation of door frames.

6. Precision Walls made certain submittals for review by SYS Constructors and the project architect relative to certain materials proposed to be used by Precision Walls in the performance of its work. One of the submittals by Precision Walls related to the proposed use of a "Seam & Seal" Tape manufactured by Berry Plastics for use in taping and sealing the joints of the blue board insulation as required under Precision Walls' subcontract. Attached hereto as Exhibit 2 is the submittal for using the Seam & Seal tape showing review by the architect for the Project and SYS Constructors without objection.
7. The exterior wall for the Project was constructed of brick veneer. SYS Constructors subcontracted with Pride Masonry to provide the labor and materials needed to construct the brick veneer wall.
8. Before the brick veneer wall could be constructed, Precision Walls had to install the blue board insulation and tape and seal each of the joints of the insulation boards. Each insulation board is approximately 4 feet by 8 feet in size which required significant taping and sealing of joints. Precision Walls had nothing to do with the construction of the brick veneer wall which could only be constructed after Precision Walls had finished its work of installing, taping and sealing the insulation boards.
9. Prior to the completion of the brick veneer wall, it was reported to me by SYS Constructors' field personnel that some of the tape sealing the joints at the insulation board was losing adhesion and coming loose. Upon further investigation by SYS Constructors using limited destructive testing to view the area behind the brick veneer

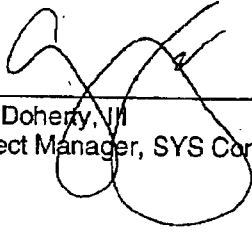
wall, a process in which I was involved, it was observed that tape was also coming loose in areas which were covered up by the brick veneer wall. The investigation conducted by SYS Constructors did not determine the reason that the tape was coming loose.

10. Taped insulation joints were essential to the integrity of the building envelope and were a requirement for preventing moisture intrusion into the interior of the building among others things. Both the Owner of the Project and SYS Constructors were unwilling to allow unsealed joints to remain behind the brick veneer wall. Accordingly, SYS Constructors directed Precision Walls, Inc. to comply with its subcontract requirements and provide taped and sealed joints at all locations. A copy of the letter sent to Precision Walls directing compliance with its subcontract obligations is attached hereto as Exhibit 3.

11. The only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick. SYS Constructors engaged its masonry subcontractor to remove the brick veneer wall in place and then build a new brick veneer wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape. Attached hereto as Exhibit 4 is a photo showing the work of Precision Walls before the brick veneer wall was constructed. Attached hereto as Exhibit 5 is a photo showing the brick veneer wall being demolished by the masonry subcontractor. The masonry subcontractor installed the brick ties seen in Exhibit 6. Lastly, attached hereto as Exhibit 6 is a photo of the brick veneer wall being re-built after new tape (seen in blue) was applied to the joints.

12. In addition to costs incurred by its masonry subcontractor, SYS Constructors also incurred additional overhead costs and expenses including additional supervision and project management time dealing with and addressing the issues associated with the tape problem. SYS Constructors compiled all of the costs associated with the tape problem and issued a deductive change order to the Precision Walls subcontract. The original change order prepared by SYS Constructors was in the amount of \$108,845.00. Through negotiations with Precision Walls, SYS Constructors agreed to reduce the amount to \$97,500.00. A final deductive change order in that amount was issued to Precision Walls. A copy of that executed change order is attached hereto as Exhibit 7.

FURTHER AFFIANT SAYETH NOT.



D.J. Doherty, III
Project Manager, SYS Constructors, Inc.

SWORN to before me this

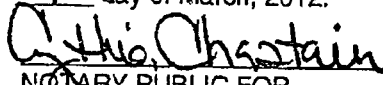
9th day of March, 2012.
 (L.S.)
NOTARY PUBLIC FOR
My Commission Ex

Exhibit 1



VENDOR COPY

Home Office
20 Brozzini Court
Greenville, SC 29615
Phone 864-234-3885
Fax 864-234-7020

Anderson Division
111-A Benson Street
Anderson, SC 29624-1605
Phone 864-231-7910
Fax 864-231-7811

**SYS CONSTRUCTORS, INC.
SUBCONTRACT**

THIS SUBCONTRACT AGREEMENT ("Subcontract") MADE THIS DATE **October 30, 2009** BY AND BETWEEN **PRECISION WALLS, INC.** ("SUBCONTRACTOR") AND **SYS CONSTRUCTORS, INC.** ("CONTRACTOR"), WHOSE PRINCIPAL OFFICES ARE LOCATED AT 20 BROZZINI COURT, GREENVILLE, SC 29615.

PROJECT NAME: Tri-County Tech (Occup Bldg)

OWNER:

PROJECT #: 09-083

ARCHITECT/ENGINEER:

SUBCONTRACTOR ADDRESS:

SUBCONTRACT NO.: 09-083.4.14

ATTN:

925 GSP Drive
Greer, SC 29651

SUBCONTRACT AMOUNT: \$582,587.00

SUBCONTRACTOR'S FEDERAL I.D. 56-1171361

SUBCONTRACTOR'S BUSINESS/SUBCONTRACTOR LICENSE #

TELEPHONE NO.: (800)849-7972

FAX NO.: (864)862-2371

ELECTRONIC MAIL ADDRESS:

RECEIVED

DEC 09 2009

SYS CONSTRUCTORS

SECTION 1. SUBCONTRACT. The terms and conditions of this Subcontract include this agreement the SYS Constructors Standard Subcontract Terms and Conditions including Sections 1 through 14 (Revision 2/2009) pages 1 through 6 inclusive ("SYS Terms and Conditions") attached hereto and the attachments listed in the SYS Terms and Conditions (collectively referred to as the "Subcontract"), all of which documents are incorporated herein by this reference. The Subcontract shall constitute the entire agreement between the Contractor and the Subcontractor for this Project.

SECTION 2. SCOPE OF WORK: The following is a general description of the Subcontractor's scope of work for the Project. The Subcontractor understands and agrees that its scope of work (hereinafter referred to as the "Work") is further defined in the SYS Terms and Conditions and the attachments listed in those terms and conditions. Attn: Pete Hubbard

Scope of work includes all material, labor, equipment and supervision of the following: all light gauge metal framing of walls, roof trusses and decking, building insulation, deugloss on exterior, taped & sealed blue board insulation on exterior, installation of door frames. Scope of work as illustrated in the drawings dated 10-6-09. All gyp board to be finished to a level 5 finish. All shaft wall and rated walls to deck are included. Indoor air quality plan guidelines are to be adhered to by Subcontractor as outlined in attachment. Exterior insulation to be sealed so as to prevent air infiltration.

SECTION 3. SUBCONTRACT PRICE: The Contractor agrees to pay the Subcontractor, subject to other provisions hereof, including additions and deletions as herein provided, the total sum of Five Hundred Eighty-Two Thousand Five Hundred Eighty-Seven dollars & 00/100 (\$582,587.00) (the "Subcontract Price") for the full and complete performance of the Work in accordance with the SYS Terms and Conditions.

IN WITNESS WHEREOF, the Contractor and Subcontractor have executed this Subcontract as of the first date written above.

SYS Constructors, Inc.

BY: D.J. Boherty

TITLE: Project Manager

WITNESS: *[Signature]*

Precision Walls, Inc.

BY: *[Signature]*

TITLE: General Manager

WITNESS: *[Signature]*

GREENVILLE 1175945.1

Revision 2/2009



SYS CONSTRUCTORS STANDARD SUBCONTRACT TERMS AND CONDITIONS

Revision 2/2009

SECTION 1. SCOPE OF WORK: The Subcontractor agrees to furnish all labor, materials, supervision, tools, equipment, supplies and incidentals (including scaffolding and hoisting facilities), unless specifically excluded herein, and in every respect complete the Work specified on the first page of the Subcontract in accordance with all the provisions, terms, and conditions of this Subcontract as set out herein for the project and owner listed on the first page of the Subcontract and in accordance with drawings and specifications prepared by the Architect/Engineer including all of the terms and conditions, including general, special, supplementary and other conditions, of the Agreement between Owner and Contractor for the project (hereinafter collectively referred to as the "Contract Documents") and by reference made a part thereof, all of which shall be considered a part of this Subcontract by these references thereto. It is understood and agreed that any reference herein to the Subcontractor's bid or proposal to perform the Work is solely and exclusively for the purpose of further technically describing the Work to be performed, and that any terms, conditions, or other qualifications in such bid or proposal are excluded and not a part of this Subcontract. The following is a general description of the Subcontractor's scope of work for the Project:

Check if Attached:

☒	Attachment 1	SYS Application for Payment Checklist
☒	Attachment 2	Application for Payment w/ Partial Lien Waivers
☒	Attachment 3	Final Release of Lien
☒	Attachment 4	Certificate of Insurance (Example)
☒	Attachment 5	Special Conditions
☒	Attachment 6	SYS Constructors Site/Safety Rules
☒	Attachment 7	Drawing Log
☒	Attachment 8	Project Schedule

SECTION 2. PRICE PAYMENT: (a) The Contractor agrees to pay the Subcontractor, subject to other provisions hereof, including additions and deletions as herein provided, the total sum listed on the first page of the Subcontract (the "Subcontract Price"), payment to be only for actual work performed to the satisfaction of Contractor and Owner and to be made on the basis of, and only to the extent of, payments actually received by Contractor from Owner, and within 10 days after such receipt by Contractor. Contractor's receipt of payment for the work performed by Subcontractor from the Owner is a condition precedent to any payment to Subcontractor. The Subcontract Price is firm and not subject to escalation, unless otherwise stated, and includes all sales, excise, use, or similar taxes applicable to the performance of the Work. Progress payments will be made to the Subcontractor each month in an amount equal to **NINETY PERCENT (90%)** of the estimated value of the labor, materials, and equipment incorporated in the construction and **NINETY PERCENT (90%)** of the estimated value of the materials and equipment suitably stored at the Project site, less the aggregate of previous payments in each case.

(b) Within ten (10) days after the date of transmission of this Subcontract to Subcontractor, Subcontractor shall submit to Contractor for Contractor's approval a detailed schedule showing a proper cost breakdown (with proper share of associated overhead and profit) of the Subcontract Price according to the various line items, or parts, of the Work, for use only as a basis for verifying Subcontractor's applications for payment.

(c) The Subcontractor shall submit two (2) copies of all invoices to the Contractor at 20 Brozzini Court, Greenville, South Carolina 29615. All requests for payment must be submitted by the twenty-fifth (25th) day of each month or such other time as may be required by the Contract Documents, on Contractor's form entitled "SYS Constructors Application for Payment and Interim Lien Waiver", a copy of which is attached as Attachment 1 and incorporated herein by reference. Requests for payment not on these forms will be returned to Subcontractor and will not be paid until Contractor receives the correct forms. The Subcontract Number must be shown on application for payment or they will be returned.

(d) The Contractor reserves the right to examine and audit Subcontractor's records for purposes of verifying the accuracy of Subcontractor's Applications for Payment.

(e) The Contractor may deduct or retain from any amounts due or to become due to the Subcontractor any sums owed by the Subcontractor to the Contractor or the amount of any claims or lien against the Contractor or the premises arising out of the Subcontractor's performance.

(f) Prior to any payment, and at the request of Contractor, Subcontractor shall furnish, in a form suitable to the Contractor, a general release of liens, and all claims, together with any affidavits that may be required by the Contractor. The Contractor reserves the right (but Contractor assumes no liability or obligation), to pay any outstanding past due obligations of the Subcontractor arising out of the performance of the Work, by checks made payable jointly to the Subcontractor and the Subcontractor's suppliers, subcontractors, or employees or payable directly to the Subcontractor's suppliers, subcontractors or employees. Any such payments shall apply as a payment on this Subcontract.

(g) Contractor reserves the right to withhold, as an additional reserve and without limiting its other rights and remedies, an amount sufficient: (i) to defend, satisfy and discharge any asserted claim that Subcontractor or anyone providing any of the Work for the Subcontractor has failed to make payment for labor, services, materials, equipment, taxes or other items or obligations furnished or incurred in connection with the Subcontractor's Work or has caused damage to the Work or any other part of the Project; (ii) to complete the Work if it appears that fund remaining in the Subcontract, including retainage and exclusive of back-charges, are insufficient to complete the Work in accordance with the requirements of this Subcontract; (iii) to reimburse Contractor

for any back-charges incurred as a result of any act or omission by Subcontractor hereunder; (iv) to protect Contractor from the possible consequences of any other breach or default by Subcontractor; or (v) to secure Contractor with respect to any breach or default by Subcontractor or its affiliates, parent company and subsidiaries under any other agreement.

(h) Subcontractor shall bond, release, or otherwise discharge any liens of its subcontractors, materialmen, suppliers or laborers sustained in connection with the Project at its sole cost and expense, within five (5) calendar days of receipt of a written or oral demand from Contractor and shall indemnify, defend and hold harmless the Contractor and the Owner from any expenses, damages or claims arising from any such liens, including any attorneys' fees incurred by either the Contractor or the Owner.

(i) Final payment will be made to the Subcontractor within (30) days after this Subcontract is fully completed and performed by the Subcontractor including, but not limited to, the submission to the Contractor of any documentation required by the Contract Documents or this Subcontract; the work hereunder is accepted in writing by the Owner, full payment for such work has been received by the Contractor from the Owner, and a complete release of any and all claims against the Contractor has been executed by the Subcontractor and delivered to the Contractor.

SECTION 3. CHANGES: Contractor may, at any time and without notice to Subcontractor's sureties, if any, make changes in, additions to and omissions from the Work, by issuance of a Subcontract Change Order. Subcontractor shall promptly proceed with the performance of this Subcontract as so changed. Notification of any claim for adjustment of Subcontract Price or for an extension of time under this section must be made in writing within TEN DAYS from the date such changes are ordered, but in no event shall such notice be provided later than the time required by the provisions of the Contract Documents between the Owner and the Contractor. Such claim shall be itemized and supported by such documents or information as Contractor or Owner may require, and submitted within an additional TEN DAYS. The failure by the Subcontractor to provide written notice of any claim within the above time limits shall constitute a waiver by the Subcontractor of such claim. To the extent that the provisions of the Contract Documents between the Owner and the Contractor contain any limitations on the adjustment of compensation or time schedules for changes, including, but not limited to, percentage markups for changes, then the Subcontractor agrees to be bound by such provisions in determining any adjustment to the Subcontract Price or change in schedule. No increase or decrease in Subcontract Price or extension of time shall be binding on Contractor unless agreed in a Subcontract Change Order signed by the Contractor's Project Manager. The signature of the Contractor's project superintendent is only an indication that the work requested under this Section has been completed. Each Subcontract Change Order issued by Contractor shall be deemed to be effective and accepted by Subcontractor at the time of the earliest of the following occurrences: (a) the date that Subcontractor signs the Subcontract Change Order; or (b) ten (10) calendar days after the date that Contractor mails the Subcontract Change Order to Subcontractor unless within that ten (10) day period, Contractor receives written notification from Subcontractor objecting to the Subcontract Change Order, which notice must specify all of Subcontractor's reasons for its objection; or (c) the date when Subcontractor begins the performance of the changed Work; or (d) the date Subcontractor submits an Application for Payment or invoice to Contractor which includes the changed Work with an adjustment to the Subcontract Price that is acceptable to Contractor. Acceptance of final payment by Subcontractor shall constitute a waiver of all claims by Subcontractor.

SECTION 4. SCHEDULES AND PERFORMANCE: (a) Subcontractor shall prosecute the Work in a prompt, diligent and workmanlike manner whenever all or any part of the Work becomes available, or at such time or times as Contractor may direct. Subcontractor agrees to perform its work in accordance with any Project time schedules provided by Contractor and any changes to said schedules. If Subcontractor discovers any errors, omissions, discrepancies, or conflicts in the plans or specifications for the Project, it shall immediately so inform Contractor in writing. Any work affected by such discoveries that is performed by Subcontractor prior to authorization by Contractor shall be at Subcontractor's risk. Subcontractor shall obtain and pay for all permits, licenses and official inspections made necessary by the Work, and comply with all laws, ordinances and regulations relating thereto.

(b) There may be other subcontractors or forces of Contractor or Owner working in the same area where Work under this Subcontract will be performed. Subcontractor understands that its work may be interfered with or temporarily delayed from time to time on account of the performance of work by others, and Subcontractor agrees to fully cooperate with Contractor and the other subcontractors to avoid any delay or hindrance of their work, and to assure orderly and expeditious performance and completion of the Project as a whole and further agrees that neither the Contractor nor the Owner shall be responsible to Subcontractor for any delay, hindrance, interference or expense caused by another subcontractor. Contractor may require that certain facilities be used concurrently by Subcontractor and others. If any part of Subcontractor's work depends for proper execution or results upon the work of others, Subcontractor shall inspect and promptly report in writing to Contractor any defects in such work that render it unsuitable for proper execution and results. Failure of Subcontractor to inspect and report shall constitute an acceptance of such other work as fit and proper for the reception of its Work. However, Subcontractor shall not be responsible for the failure to discover latent defects in the work of others.

(c) Subcontractor acknowledges and accepts the sole responsibility for costs which may result from the nature and location of work and the general and local conditions and all other matters which can in any way affect performance of the Subcontract, or the cost associated with such performance. Failure of Subcontractor to acquaint itself with any applicable condition will not relieve it from the responsibility for the difficulties or the costs of successfully performing the Subcontract.

(d) Contractor's failure to insist on performance of any term, condition, or instruction, or to exercise any right or privilege included in this Subcontract, or its waiver of any breach, shall not thereafter waive any such term, condition, instruction, and/or any right or privilege.

SECTION 5. CONTRACTUAL RELATIONSHIP: To the extent that provisions of the Contract Documents between the Owner and Contractor apply to the Work of the Subcontractor, Subcontractor shall assume toward the Contractor all the obligations and responsibilities which the Contractor, by the Contract Documents, assumes toward the Owner and the Architect/Engineer, and shall only have the rights, remedies and redress against the Contractor which the Contractor, by the Contract Documents, has against the Owner, provided that where any provision of the Contract Documents between the Owner and Contractor is inconsistent with any

provision of this Subcontract, this Subcontract shall govern. The Contractor will provide the Subcontractor with an unpriced copy of the Contract Documents if requested by the Subcontractor in writing, provided that the Subcontractor shall reimburse the Contractor for its copying costs. In the event that the Contract Documents between the Owner and the Contractor contain an arbitration agreement, the Subcontractor agrees that any arbitration proceeding initiated by it or by the Contractor may, at the Contractor's option, be consolidated with any arbitration proceedings between the Owner and the Contractor and/or between the Contractor and any other contractor, subcontractor, or supplier, and agrees to be bound to Contractor to the same extent that Contractor is bound to Owner by any decisions or awards made in such proceedings. Notwithstanding any provision of this Subcontract to the contrary, Contractor may, at its sole discretion, elect to arbitrate any claims or disputes between Contractor and Subcontractor in accordance with the then current Construction Industry Rules of the American Arbitration Association. No claim or dispute or other matter in controversy shall interfere with the progress of the Work and the Subcontractor shall proceed with its Work despite the existence of, and without awaiting the resolution of, any such claim or dispute.

SECTION 6. WARRANTY AND INSPECTIONS: (a) The Subcontractor expressly warrants that all materials, work and equipment incorporated in the Work shall conform to the specifications, drawings, samples and other descriptions set forth in the Subcontract and the Contract Documents and will be of good materials and workmanship and free from defect and warrants that all materials and equipment are both merchantable and fit for the purposes for which they are intended to be used under the Contract Documents. Subcontractor's warranty under this Subcontract shall extend for the same period and to the same coverage extent that the Contractor is obligated to guarantee its work under the Contract Documents with the Owner, regardless of when the Work under this Subcontract was performed by Subcontractor or by any of its subcontractors of any tier. Upon receipt of written notice from Contractor or Owner of any breach of warranty during the applicable warranty period, Subcontractor shall correct the affected work and all costs incurred as the result of breach of warranty shall be borne by Subcontractor. Should Subcontractor fail to make the necessary correction promptly, Contractor may perform or cause to be performed the necessary work at Subcontractor's expense. All warranties shall run to Contractor and Owner and their respective successors and assigns. The above warranties are not intended as a limitation but are in addition to all other express warranties set forth in this Subcontract or the Contract Documents and such other warranties as are implied by law, custom and usage of trade. Subcontractor and its surety or sureties, if any, shall be liable for the satisfaction and full performance of the warranties set forth herein.

(b) Subcontractor shall, at its own expense, have its work tested and inspected in accordance with the requirements of the Contract Documents, this Subcontract, the suppliers or manufacturers of the materials or systems and applicable industry standards, and shall submit one copy of all tests or inspection reports to Contractor within two (2) days of its receipt of said reports. Neither the submission of any tests or inspection reports to Contractor nor the review of said reports by Contractor shall relieve the Subcontractor of its responsibility to comply with the requirements of the Contract Documents.

(c) The Work and all materials and equipment furnished in connection therewith shall at all times be subject to inspection by Contractor or Owner. Subcontractor shall, at its own expense, provide safe and necessary facilities and all samples, documents, drawings and lists necessary for such inspection. If any material, equipment or any part of the Work is determined by Owner or Contractor, either during performance of the Work, or on final inspection, or during any applicable guarantee period, to be defective or not in compliance with the requirements thereof, Contractor shall notify Subcontractor in writing that such material, equipment or work is rejected. Thereupon, Subcontractor shall, at its own expense, immediately replace or correct such defective material, equipment or work by making the same comply strictly with all requirements thereof.

SECTION 7. INSURANCE AND BOND REQUIREMENTS: (a) The Subcontractor shall provide and maintain worker's compensation insurance in each jurisdiction in which the work is to be performed with limits required by law of an employer, and employer's liability insurance with minimum limits of \$500,000. The Subcontractor also shall provide and maintain in full force and effect during the term of this Subcontract Commercial General Liability and Automobile Liability Insurance in a company satisfactory to the Contractor, protecting the Subcontractor, the Owner and the Contractor against liability from damages growing out of any operation of the Subcontractor, (including the operation of automobiles, trucks, and other vehicles owned or rented) in connection with the performance of this Subcontract and also including liability arising after completion of such operations. The Commercial General Liability Insurance shall expressly cover any contractual liability assumed by Subcontractor under this Subcontract.

(b) All insurance that the Subcontractor is required to maintain under this subcontract shall have at least the following amounts of coverage:

1. Worker's Compensation	Limits: Statutory
Employer's Liability	
Policy Limit	Limits \$ 500,000
Each Accident	Limits \$ 500,000
Each Employee by Disease	Limits \$ 500,000
2. Commercial General Liability	
General Aggregate	Limits \$2,000,000
Each Occurrence	Limits \$1,000,000
Fire Damage	Limits \$ 50,000
Medical Expense	Limits \$ 5,000
	Limits Apply Per Project

3. Commercial Auto

Combined Single Limit
Liability & Property Damage

Limits \$1,000,000

(c) The Subcontractor will submit to the Contractor two (2) copies of certificate of insurance naming Contractor and Owner as an additional insured, and certifying that the insurance policies carried by the Subcontractor were in force before the Subcontractor begins performance of the Work and certifying that these policies will not be canceled during the period of construction other than by an endorsement added to the policies and certificates reading substantially as follows: "The policies herein referred to are not cancelable or subject to a reduction of coverage by the insurer unless SYS Constructors, Inc. has received thirty (30) days prior written notice, as evidenced by return receipt of registered or certified letter". The insurance provided by Subcontractor shall be primary and non-contributory with respect to any insurance which Contractor or Owner may, at their discretion, elect to provide, and shall contain a waiver of subrogation in favor of Contractor and Owner, and any of their agents and/or employees. The policies required pursuant to this Section, except for Workers Compensation, shall provide such waiver of subrogation by endorsement or otherwise. Comprehensive General Liability and Automobile Liability Insurance shall contain a cross liability endorsement and a severability of interest clause. Above limits shall apply on a per project basis.

(d) Should Subcontractor sublet any of the work to a third party, Subcontractor shall require such third party to furnish the same insurance and indemnity, and shall require all of its subcontractors to waive their rights of subrogation in each of their respective contracts as required of the Subcontractor hereunder and Subcontractor shall provide evidence thereof prior to allowing any of its subcontractors to commence any of their work.

(e) At any time prior to the Subcontractor's commencement of performance of the work at the project site, the Contractor shall have the right to require the Subcontractor to furnish a Performance Bond and a Labor and Material Payment Bond, each in an amount equal to the full Subcontract Price, which bonds shall be in a form and with a surety satisfactory to the Contractor. If the Subcontractor was not otherwise required to furnish the performance and payment bonds pursuant to either the Contractor's request for a proposal or Subcontractor's proposal or the Contract Documents, then the Subcontract Price shall be increased by the amount paid by the Subcontractor as the premium for said bonds without any markup for profit or overhead by the Subcontractor.

(f) If Contractor provides the Builders Risk Insurance for the Project, the Subcontractor is responsible for its pro-rata share of the Contractor's deductible under said insurance. Subcontractor's share of the deductible shall be the ratio that its losses covered by the Builder's Risk Insurance bears to the total loss of the occurrence or event covered by said insurance.

SECTION 8. INDEMNIFICATION: For and in consideration of the covenants of Contractor under this Subcontract, and in consideration of \$10.00 and other good and valuable consideration in hand paid to Subcontractor upon the execution hereof, Subcontractor hereby assumes the risk of, and agrees to indemnify, defend and hold harmless Contractor, Owner, and employees and agents of each (hereinafter referred to as the "Indemnitees") against, from all losses, damages, liabilities, costs and expenses (including without limitation, reasonable attorneys' fees) arising out of or resulting from or in any way connected, in whole or in part, with Subcontractor's performance or breach of the provisions or covenants of this Subcontract; provided, however, that this Section shall not be construed to constitute an indemnification against any loss, damage, liability, cost or expense caused solely by the negligence of such Indemnitee. Further, Subcontractor agrees to defend, indemnify and save harmless the Contractor from any claims, suits, liability or expense for any alleged or actual infringement or violation of any patent or patent rights, arising out of or in connection with this Subcontract and anything done hereunder. At the election of an Indemnitee, Subcontractor, at its own expense, also shall defend such Indemnitee against any claim, demand, action or suit for which indemnification is provided hereunder. Subcontractor agrees that \$ 10.00 of the Subcontract Price constitutes a separate consideration for Subcontractor's indemnity obligations hereunder. If, on account of any breach or default by Subcontractor of its obligations to Contractor under this Subcontract, it shall become necessary for Contractor to employ attorneys to enforce or defend any of its rights or remedies hereunder, and should Contractor prevail, Contractor shall be entitled to receive from Subcontractor any reasonable attorney's fees and other legal cost incurred in such connection.

SECTION 9. LABOR CONDITIONS AND SUBCONTRACTORS: Subcontractor agrees that all labor employed by it, its subcontractors, or assigns for work on the Project shall be in harmony with and be compatible with all other labor being used by the Contractor or other subcontractors. Subcontractor shall not sublet, assign or transfer this Subcontract or any part hereof, or any sums due or to become due hereunder, without prior written consent of Contractor, and any such assignment without Contractor's written consent shall be void and of no binding effect upon Contractor. Within ten (10) days of the date of this Subcontract, Subcontractor shall furnish to the Contractor a list containing the names, addresses, and telephone numbers of all subcontractors and material suppliers that the Subcontractor intends to use in the performance of the Subcontract. Neither the Subcontractor nor any of its subcontractors shall employ or continue to employ on the Project any person whose employment on the Project is objected to by the Contractor or the Owner. Subcontractor agrees that if any portion of the Work covered hereby is further subcontracted, such lower-tier subcontractor shall be bound by and observe the provisions of this Section to the same extent as herein required of Subcontractor and that this Section shall be included in any lower-tier subcontract. The Subcontractor agrees that the Contractor has the right to contact any of its lower-tier subcontractors and suppliers in connection with either the performance of the Subcontractor or the payment of the lower-tier subcontractors and supplies by the Subcontractor.

SECTION 10. COMPLIANCE WITH LAWS AND SAFETY: (a) In the performance of the work hereunder, Subcontractor shall comply with all Federal, State and Local laws or regulations relating to nondiscrimination against any employee or applicant for employment because of race, religion, color, national origin, sex or ancestry with respect to hiring, promotion, demotion, transfer, recruitment, termination, rates of pay or other forms of compensation, and selection for training.

(b) In the performance of the work hereunder, Subcontractor shall comply with all current safety requirements of Federal, State and Local laws or regulations. Subcontractor shall also comply with all safety requirements and rules of the Contractor and the Owner.

Compliance to all relative OSHA requirements is the sole responsibility of the Subcontractor. Subcontractor agrees to comply to the Special Conditions (Attachment 5) and Site/Safety Rules (Attachment 6).

SECTION 11. TIME (a): If the Subcontractor's performance of the Work is delayed or interfered with by any condition or action directly caused by Contractor and/or Owner or other conditions beyond the control and without the fault or negligence of Subcontractor, and which was not foreseeable by Subcontractor, Subcontractor shall, within five (5) calendar days of the commencement of any such delay give to Contractor written notice thereof and Subcontractor shall be entitled an extension of time of performance, as a consequence of such delays or interference, but only to the extent that the Contract Documents between the Owner and Contractor entitles the Contractor to an extension of time for such delays and then only to the extent of time extensions that the Contractor does, on behalf of the Subcontractor, actually obtain from the Owner for such delays or interference. Subcontractor shall not be entitled to, and hereby waives any rights to, additional compensation for any interruptions, interferences, inefficiencies, suspensions or delays except to the extent, and only to the extent, such interruptions, interferences, inefficiencies, suspensions or delays were caused by the Owner and compensation for same is recovered from the Owner. The Subcontractor expressly waives any claims for consequential, special or incidental damages resulting from such delays or interference, including, but not limited to, impact or ripple effects, loss of productivity or increased home office overhead expenses. The failure of Subcontractor to provide notice as provided in this Section shall constitute a waiver of any claims for adjustments in both the Subcontract Price and the Subcontract time.

(b) Subcontractor agrees to perform work in a manner that will not injure, damage or delay the Project or work of other subcontractors on the Project. If the Subcontractor delays the Project, the Contractor shall be entitled to order the Subcontractor, at the Subcontractor's sole expense, to provide additional labor, to work overtime and additional shifts and to expedite the furnishing of materials or equipment as to avoid or minimize delaying or interfering with the completion of the Project.

SECTION 12. TERMINATION: (a) In the event Subcontractor fails to comply or becomes disabled from complying with the provisions of this Subcontract as to character or time of performance, and the failure is not corrected within 48 hours after written request is made by Contractor to Subcontractor, or if such default cannot be remedied within such period and Subcontractor does not within said 48 hour period commence and continue such act or acts as shall be necessary to remedy such default or neglect with diligence and promptness, Contractor may take over and complete the performance of this Subcontract (by subcontract to others and otherwise) at the expense of Subcontractor, or without taking over the Work, Contractor may furnish the necessary materials and/or employ the workmen necessary to remedy the situation at the expense of Subcontractor. If Contractor takes over the Work pursuant to this paragraph, it is specifically agreed that Contractor may take possession either in whole or in part of the premises and of all materials and equipment of Subcontractor at the site for the purpose of completing the Work, and Subcontractor shall not be entitled to receive any further payments until the Work is completed and finally accepted. Upon completion and final acceptance of the Work, Contractor will determine the total expense incurred and accrued in completion and/or correcting the Work (including, without limitation, additional overhead and legal expenses incurred and accrued by Contractor to effect such takeover and to complete the Work, plus a mark-up for profit in the amount of 10% on the cost of the Work performed by Contractor's forces and/or other subcontractors retained by the Contractor). If the balance of the Subcontract Price unpaid at the time the Work is taken over exceed such total expense, the amount of such excess shall be paid to Subcontractor. If the total expense of completing the Work exceed the balance of the Subcontract Price unpaid at the time the Work is taken over, Subcontractor shall pay to Contractor promptly after receipt of an invoice the amount of such excess. Improper termination under this Section 12 (a) by Contractor shall be deemed termination under Section 12(b) of this Subcontract.

(b) The performance of Work under this Subcontract may be terminated in whole or in part, at any time at the convenience of the Contractor or the Owner for any reason by written notice. Upon receipt of said notice, Subcontractor shall, unless the notice directs otherwise, immediately discontinue the Work on the date and to the extent specified in the notice; place no further orders or subcontracts for materials, equipment, services or facilities, except as may be necessary for completion of such portion of the Work as is not discontinued; promptly make every reasonable effort to procure cancellation of subcontracts and purchase orders on terms satisfactory to Contractor; promptly delivery all equipment, materials and other goods for which the Subcontractor has received payment to the Contractor at the location (s) directed by Contractor, and shall thereafter do only such work as may be necessary to preserve and protect Work already completed or in progress and to protect materials and equipment on the Project. In such event, the Subcontractor will be entitled to payment for all work satisfactorily completed in an amount equal to the product obtained by multiplying the Subcontract amount by the percent of the work completed as of the effective date of termination, plus reasonable costs associated with such termination. The Subcontractor will not be entitled to and expressly waives any claims for payment for uncompleted Work, or for anticipated profit or unabsorbed overhead on such uncompleted Work, or any other expenses or damages, including any claims for consequential, special or incidental damages, resulting from termination under this Section 12(b).

SECTION 13. WASTE AND DEBRIS: The Subcontractor shall be responsible for keeping the Subcontractor's portion of the project clean and in an orderly fashion to the satisfaction of the Contractor, Owner or Architect/Engineer. At a minimum, the Subcontractor shall, at the end of each day, place all debris and waste generated from its work into the dumpsters or other waste containers provided by either the Contractor or the Owner and shall leave the portions of the Project on which it worked at least broom clean. The Contractor reserves the right to modify, from time to time, the cleanup and disposal requirements for the Project, modifications shall not entitle the Subcontractor to any increase in the Subcontract Price. Should it become necessary for the Contractor to incur any expense performing cleanup of the Subcontractor's work or removing the Subcontractor's debris from the Project, such expense shall be reimbursed to the Contractor by the Subcontractor or may be deducted by the Contractor from any amount due or to become due to the Subcontractor hereunder.

SECTION 14. MISCELLANEOUS: (a) All of the terms and conditions of this Subcontract, without modification or variation, shall be deemed to be effective and accepted by Subcontractor at the time of the earliest of the following occurrences: (i) the date that Subcontractor signs the Subcontract; or (ii) ten (10) calendar days after the date that Contractor mails the Subcontract to Subcontractor unless within that ten (10) day period, Contractor receives written notification from Subcontractor objecting to the Subcontract, which notice must specify all of Subcontractor's reasons for its objection; or (iii) the date when Subcontractor begins the performance of the Work.

(b) The terms and conditions of this Subcontract are to be considered severable and in the event any section, or any part or portion of any section of this Subcontract shall be held to be invalid, void or otherwise unenforceable, such holding shall not affect the remaining part or portions of that section, or any other section hereof.

(c) This Subcontract and the rights of the parties under this Subcontract shall be governed by and construed and enforced in accordance with the laws of the state of the Project.

To be effective immediately, any modifications to these documents must be made on both copies and initialed by both parties or part of a subcontract addendum signed by both parties.

Please sign and return both copies of the attached document. SYS Constructors will return one (1) fully executed copy for your records. If you have questions regarding the attached, please contact our office.



J Brozzini Court
Greenville, SC 29615
(864) 288-3885

Attachment #1

Date: _____

Subcontractor Name: _____

Project Name/Number: _____

Application Number: _____

Application Date: _____

This is a One-Time Courtesy Notice to inform you that the above referenced application for payment is not in compliance with your SYS Subcontractor Agreement for the following reason(s):

1. Applications for payment must be originals: ☐
2. Applications for payment must be made on SYS Forms: ☐
3. Applications for payment must be signed and notarized: ☐
4. Requests for final payment must be made on SYS Application for payment form and accompanied by a final release of lien: ☐
5. Calculation error- Please ensure addition/subtraction is correct. Please revise and resubmit: ☐
6. Application for payment contains an unapproved change order. Please revise and resubmit or contact Project Manager: ☐
7. Application for payment has been over billed due to a reduction in contract by the Project Manager please revise and resubmit: ☐
8. Please provide us with a W-9 and/or a current certificate of insurance that is in compliance with SYS requirements. ☐

*Please note that no further action will be taken to process this application for payment until ALL CORRECTIONS have been made.

*Applications revised and resubmitted correctly will be processed promptly and in accordance with SYS Subcontractor Agreement terms.

*Please ensure that all future applications for payment are in compliance with your SYS Subcontractor Agreement.

Dana Galloway
Controller

FROM:

SYS CONSTRUCTORS, INC.

PROJECT:

APPLICATION NO:

APPLICATION DATE:

PERIOD FOR APPLICATION:

SUBCONTRACT DATE:

In consideration of the payment of the sum approved by SYS Constructors, Inc. above, the Subcontractor does hereby:

- Subcontractor makes this Application in order to induce payment, and upon receipt of said payment, this release of claims and waiver of lien becomes in full force and effect.

WITNESS our hand and seal this _____ day of _____

By:

Title:

**SUBCONTRACTOR'S/SUPPLIER'S FINAL RELEASE OF LIEN
AND
GENERAL RELEASE**

KNOW ALL MEN BY THESE PRESENTS, THAT

WHEREAS, _____ ("Subcontractors/Suppliers") heretofore entered into a certain subcontract or purchase order (the "Subcontract") with SYS CONSTRUCTORS, INC., hereinafter referred to as "Contractor" for which the hereinbelow release is given. Contractor contracted the work from _____ ("Owner") for _____ (the "Project"). The Subcontractor provided materials, labor and/or equipment for _____

NOW THEREFORE, in consideration and upon payment of the sum of _____ Dollars (\$ _____) paid by Contractor to the Subcontractor/Supplier, which sum represents the full amount payment due to Subcontractor under and pursuant to the above referenced Subcontract, the Subcontractor does hereby:

1. Certify to Contractor and Owner that all persons, firms, associations, corporations, or other entities furnishing labor, materials, equipment, or supplies to Subcontractor/Supplier with respect to the Subcontract have been paid in full, including any and all applicable federal, state, and local sales, use, excise, or similar taxes or import duties, licenses and royalties.
2. Remise, release, waive, and relinquish : (a) all claims or right of lien which the Subcontractor/Supplier ever had, now has, or which it hereafter can or may have upon any portion of the real property of the Owner or any buildings or other improvements thereon for labor, material or equipment furnished under the Subcontract, (b) any rights it has against any labor, material payment or performance bonds or lien discharge bonds provided by the Contractor relating to the Project, and (c) any claims for additional compensation of any kind, including delay, disruption, interference, or acceleration accruing prior to the dated of this release, and
3. Agree to indemnify and save harmless Contractor and Owner, their affiliates, successors or assigns, against all loss, cost, damage or expense (including, but not limited to attorney's fees) by reason of any and all manner of liens, claims or demands which anyone may have for labor performed, for material or equipment furnished under the Subcontract, or for, upon or by reason of any matter, cause or thing whatsoever arising under or out of the Subcontract.

IN WITNESS WHEREOF, Subcontractor/Supplier has duly caused these presents to be signed and attested by its duly authorized owner, partner or officer (and, if a corporation, its corporate seal to be hereunto affixed) on the _____ day of _____, 20__.

SWORN to before me this

_____ day of _____, 20__.

(Signature)

Notary Public for: _____

My Commission Expires: _____

(Notary Seal)

Company

Signature

Title

Attachment 4

ACORD CERTIFICATE OF LIABILITY INSURANCE				DATE (MM/DD/YYYY)	
PRODUCER (864) 234-8000 FAX: (864) 234-8001 Capstone Insurance Services, LLC 67 Creekside Park Court Post Office Box 26989 Greenville SC 29615				THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.	
INSURED STS Constructors, Inc. 20 Brozzini Court Greenville SC 29615				INSURERS AFFORDING COVERAGE INSURER: Cincinnati Insurance 367311 INSURER: Kay Risk Insurance 10885 INSURER: Columbia Casualty Co. 31127 INSURER: INSURER:	
COVERAGES					
THE POLICIES OF INSURANCE LISTED BELOW HAVE BEEN ISSUED TO THE INSURED NAMED ABOVE FOR THE POLICY PERIOD INDICATED. NOTWITHSTANDING ANY REQUIREMENT, TERM OR CONDITION OF ANY CONTRACT OR OTHER DOCUMENT WITH RESPECT TO WHICH THIS CERTIFICATE MAY BE ISSUED OR MAY PERTAIN, THE INSURANCE AFFORDED BY THE POLICIES DESCRIBED HEREIN IS SUBJECT TO ALL THE TERMS, EXCLUSIONS AND CONDITIONS OF SUCH POLICIES. AGGREGATE LIMITS SHOWN MAY HAVE BEEN REDUCED BY PRIOR CLAIMS.					
INSURED LINE NUMBER	TYPES OF INSURANCE	POLICY NUMBER	POLICY EFFECT DATE (MM/DD/YYYY)	POLICY EXPIRATION DATE (MM/DD/YYYY)	LIMITS
A	GENERAL LIABILITY ☒ COMMERCIAL GENERAL LIABILITY ☐ CLAMS MADE ☒ OCCUR GEN. AGGREGATE LIMIT APPLIES PER POLICY ☒ ☐ 100	CY 557 25 00	4/15/2008	4/15/2009	EACH OCCURRENCE \$ 1,000,000 DAMAGE TO RENTED PREMISES \$ 500,000 MED EXP (per occurrence) \$ 10,000 PERSONAL AND ADULTERY \$ 1,000,000 GENERAL AGGREGATE \$ 2,000,000 PRODUCTS - COMPOUND \$ 2,000,000
A	AUTOMOBILE LIABILITY ☒ ANY AUTO ☐ ALL OWNED AUTOS ☐ SCHEDULED AUTOS ☒ HIRED AUTOS ☒ NON-OWNED AUTOS ☒ COLL. DED \$1,000 ☒ COMB. DED \$1,000	CY 557 25 00	4/15/2008	4/15/2009	COMBINED SINGLE LIMIT (per accident) \$ 1,000,000 BODILY INJURY (per person) \$ BODILY INJURY (per accident) \$ PROPERTY DAMAGE (per accident) \$
G	DAMAGE LIABILITY ☐ ANY AUTO ☒ Design Build PL \$1,000,000 Agg/Per Claim	Professional Liability CIB 28 827 28 46 \$1,000,000 Agg/Per Claim	07/24/2007	07/24/2008	AUTO ONLY - EA ACCIDENT \$ OTHER THAN EA ACC \$ AUTO ONLY AGG \$
A	RECREATIONAL LIABILITY ☒ OCCUR ☐ CLAMS MADE ☐ DEDUCTIBLE ☒ RETENTION AD	CY 557 25 00	4/15/2008	4/15/2009	EACH OCCURRENCE \$ 5,000,000 AGGREGATE \$ 5,000,000
B	WORKERS COMPENSATION AND EMPLOYERS' LIABILITY ANY PROPRIETOR/PARTNER/EXECUTIVE OFFICER/OWNER EXCLUDED? Yes, describe with SPECIAL PROVISIONS below	B09 4337 108	4/15/2008	4/15/2009	☒ V.C. STATE ☐ O.C. EL EACH ACCIDENT \$ 1,000,000 EL DISEASE - EA EMPLOYEE \$ 1,000,000 EL DISEASE - POLY LIMIT \$ 1,000,000
A	Other Bldg Builders' Risk Installation Floater Deductible	CY 557 25 00	4/15/2008	4/15/2009	\$5,500,000 \$250,000 \$1,000
DESCRIPTION OF OPERATION/LOCATION/VEHICLES/EXCLUSIONS ADDED BY ENDORSEMENT/SPECIAL PROVISIONS					
CERTIFICATE HOLDER FOR INFORMATION PURPOSES ONLY			CANCELLATION SHOULD ANY OF THE ABOVE DESCRIBED POLICIES BE CANCELLED BEFORE THE EXPIRATION DATE THEREOF, THE ISSUING INSURER WILL ENDEAVOR TO MAIL 30 DAYS WRITTEN NOTICE TO THE CERTIFICATE HOLDER. UNLESS TO THE LEFT, BUT FAILURE TO DO SO SHALL IMPOSE NO OBLIGATION OR LIABILITY OF ANY KIND UPON THE DESIGNATED AGENTS OR REPRESENTATIVES. AUTHORIZED REPRESENTATIVE Tracy Beaman/KAREN <i>Tracy Beaman</i>		

 ACORD 25 (06/01/06)
 11/09/07 4/09/08

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 Page 1 of 7

**SPECIAL CONDITIONS****PROJECT REQUIREMENTS**

- Subcontractor shall be responsible for projecting and securing their materials and equipment required for the performance of the work. Subcontractor shall protect work in place until such time accepted by the Owner. Subcontractor shall respect work by others and notify that trade of which he may have damaged and make reconciliation to that damaged party.
- All tie-ins to existing building and building utilities may be required during weekend or off-hours and Subcontractor acknowledges and has included such conditions in his proposal.
- Shop drawings, submittals, and product data shall be provided by Subcontractor in sufficient time as not to delay Owner approval, purchase delivery and installation by Subcontractor so as not to affect Construction Schedule but in no case longer than ten (10) days after contract date. Said documentation shall be submitted with a minimum of six (6) copies.
- Subcontractor shall have a representative at the scheduling and coordination meetings who is knowledgeable of the contract requirements and said representative shall have the authority to make decisions as they relate to the decisions to be made at that meeting to insure timely progress and continuation of the project Schedule. Failure to attend these meeting will result in a delay in payment applications, as these meeting are a vital key to the success of this project.
- Normal Project work hours shall consist of four (4) 10-hour days, occurring Monday thru Thursday, beginning at 7:00 AM and ending at 5:30 PM. Work at other times shall only occur with prior written consent of the Contractor. The cost of any overtime supervision on the part of the Contractor, made necessary by circumstances under the Subcontractor's control, shall be borne by the Subcontractor.
- Subcontractor shall plan, coordinate and execute work in such a manner that neither the Owner's nor the Contractor's operation will be interrupted or delayed.
- Subcontractor shall maintain at all times on the project, a current set of Contract Documents, "red-lined" according to the most recent changes or modifications in the field. At the conclusion of the project, Subcontractor shall submit THREE (3) close-out procedures including submittal of test results, Certification Documents, Operation and Maintenance Manuals THREE (3) copies each, Warranties, and Guarantees. These procedures shall be completed prior to final closeout and must be submitted prior to release of retinage.
- Within ten (10) days of the date of this Agreement, Subcontractor shall submit the following:
 1. Any specific space requirements adjacent to construction site for performance of work and storage of materials or trailer
 2. Bar chart schedule detailing the Subcontractor's work as weekly manpower requirements with the Project Schedule (Attachment 8)
 3. Weekly field manpower chart
 4. Submit a complete Schedule of Values for review and approval

TEMPORARY CONSTRUCTION SERVICES

- An open top dumpster may be provided on the project for general clean-up only (misc. debris, floor-swept materials). Crates, boxes, and discarded or unused materials, as generated by the Subcontractor, shall be crushed and/or disassembled before placing in dumpster in an efficient manner. Dumpsters for specific materials may be provided requiring separation of debris. No hazardous materials may be placed into these dumpsters.
- Construction heating will be provided at such time building HVAC system can be energized. Subcontractor shall be responsible for heating requirements as it relates to his responsibility of work.
- General building illumination and convenience power will be provided per project requirements. Any and all other lighting power required for the performance of work under this subcontract shall be the responsibility of the Subcontractor. Combustible operating engines are not allowed within the building.

Initial 



Attachment #6

JOBSITE SAFETY RULES & REGULATIONS

SYS Constructors' visitors, employees, and subcontractors are required to operate in strict accordance with all OSHA Rules and Regulations. In addition to OSHA requirements, SYS Constructors' Corporate Safety & Health Program, and these rules and regulations also apply to **ALL JOBSITE PERSONNEL** on SYS Constructors' projects:

1. Workers must wear hard hats and approved shirts, long pants, and appropriate footwear at all times. Other personal protective equipment to be worn as required by governmental agency regulations.
2. The jobsite is to be cleaned up daily and trash removed to a designated site. Stored materials are to be kept in an orderly fashion.
3. All power tools, equipment and ladders are to be used in a safe manner and in compliance with governmental agency regulations.
4. Guardrails or covers are not to be removed without permission from the job superintendent and are to be replaced immediately. Harnesses and lanyards must be used until protection is reinstalled.
5. Approved fall protection is required for all work greater than 6' above ground level.
6. Only authorized and trained personnel are to operate equipment and vehicles.
7. Any hazardous conditions are to be reported to the SYS superintendent immediately.
8. All accidents, injuries, and near misses are to be reported to your supervisor immediately.
9. No personal radios/electronic devices of any kind, minor children, or personal pets are allowed on the jobsite.
10. No hazardous or toxic substances are to be disposed of on the jobsite. All federal, state, and local laws relating to the use of hazardous or toxic materials are to be complied with fully.
11. The use and/or possession of concealed weapons, alcoholic beverages, and controlled substances on controlled substances on the jobsite is prohibited. Use or possession will be grounds for immediate removal of the offender from the jobsite.
12. Eating and the use of tobacco products are limited to designated areas.
13. Subcontractors are required to attend the weekly safety meetings. In the case that the subcontractor is performing their own safety meetings, SYS Constructors shall be supplied with copies of the topic discussed and signed personnel log of those in attendance.
14. All workers must have current drug screen before working on site. This project is a drug-free work area. Subcontractors and their employees may be required to provide certification of drug testing results.
15. Subcontractors must name in writing the "Competent Person" on site prior to mobilization.
16. Visitors, subcontractors, and vendors must notify Superintendent immediately upon entering the project worksite.
17. Any welding and torch cutting shall require a written permit from the Contractor. All safety precautions shall include fire watch and appropriate fire extinguisher equipment.
18. A designated construction parking area will be identified. All construction personnel will be required to park in this area.
19. Upon written request by Contractor the Subcontractor will provide any and all safety information including but not limited to: (1) Subcontractors written safety program, (2) RIR, (3) EMR and (4) OSHA 200 log.
20. SYS Superintendents and Project Managers have the authority to enforce these and any other safety and health standards or practices deemed necessary to maintain a safe project.

I have read and understand each of the Safety Rules and Regulations listed above and agree to comply with them. I further understand that non-compliance may result in termination of my employment and/or contract.

Initial 

Exhibit 2



FILE COPY

Home Office
26 Brazeal Court
Greenville, SC 29615
Phone 804-225-3685
Fax 804-224-7820

Anderson Division
111-A Bessey Street
Anderson, SC 29624-1585
Phone 804-221-7910
Fax 804-221-7991

4.14

Submittal

Job: 09-083
Tri-County Tech (Occup Bldg)
1774 Powdersville Road
(State Proj No. H59-9990-GW)
Easley, SC 29642

Spec Section No: 07210

Submittal No: 1

Revision No: 0

Sent Date:

DEC 10 2009

SYS CONSTRUCTORS

Spec Section Title: Building Insulation
Submittal Title: Thermal Insulation

Contractor:
SYS Constructors, Inc.
DJ Doherty

☒ REVIEWED	☐ REVISE AND RESUBMIT
☐ REJECTED	☐ FURNISH AS CORRECTED

Contractor's Statement: I hereby certify that the above drawings and specifications were prepared by me or under my direct supervision and that I am a duly licensed professional engineer or architect in the State of South Carolina. I am responsible for the accuracy and completeness of the drawings and specifications and for the proper construction of the work shown thereon. I am also responsible for the proper installation of the work shown thereon. I am not responsible for the design of the work shown thereon.

SYS Constructors, Inc.
11-30-09

Architect (Primary):
Neal Prince + Partners
Chris Stone
00935

☒ Reviewed	☐ Rejected
☐ Revise & Resubmit	☐ Furnish as Corrected

Contractor's Statement: I hereby certify that the above drawings and specifications were prepared by me or under my direct supervision and that I am a duly licensed professional engineer or architect in the State of South Carolina. I am responsible for the accuracy and completeness of the drawings and specifications and for the proper construction of the work shown thereon. I am also responsible for the proper installation of the work shown thereon. I am not responsible for the design of the work shown thereon.

Neal Prince + Partners, Architects, Inc.
BY: [Signature] DATE: 12-7-09

Architect's Stamp

Engineer's Stamp

LM 00094

Precision Walls, Inc.
925 GSP Drive
Greer, SC 29651
Phone: (864) 334-2100
Fax: (864) 334-2101

PROJECT NAME: Tri-County Technical College
1774 Powdersville Rd.
Easley, SC 29642
ARCHITECT: Neal Prince Architects
CONTRACTOR: SYS Constructors
SPEC SECTION: 07210 Thermal Insulation

The following product data is being submitted for approval:

Manufacturer	Product	Type	Location
CertainTeed	Certa Pro Acoustix Thermal	R-11 Unfaced Batt Insulation	Interior Walls
CertainTeed	Certa Pro Thermal	R-19 Fraft Faced Batt Insulation	Louvers, head of Exterior Wall & Truss Locations
Owens Corning	Fomular 150	2" Extruded Polystyrene Rigid Insulation	Exterior walls & Sheathing
Berry Plastics	Barricade	1 7/8" Seam & Seal Tape	Joints of Rigid Insulation

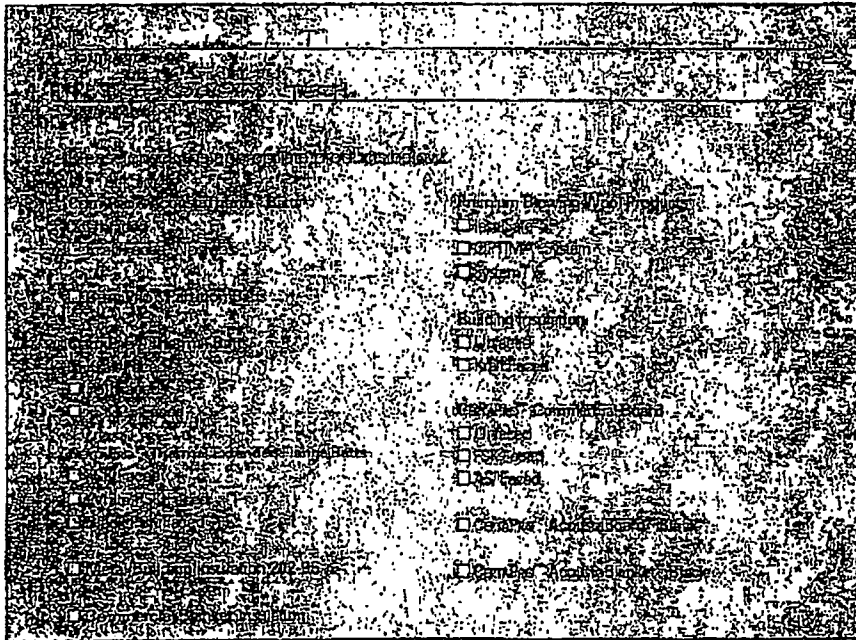
Notes/Clarifications:

LM 00095

CertainTeed 

Submittal Form

Commercial Fiber Glass Insulation Products



CertainTeed Corporation, P.O. Box 880, Valley Forge, PA 19482
1-800-233-8990

Visit our website at: <http://www.certainteed.com> • Fax-on-Demand service: 1-800-847-0057
Customer Service 800-441-9850 • Fax 800-709-2381

CertainTeed was the first fiber glass insulation manufacturer to have all its manufacturing plants, R&D center and corporate headquarters registered to ISO 9001-2000 standards.

LM 00096

Product	Description	Thermal Resistance*	Nominal Thickness	Applicable Standards
CeramPro™ AcoustiTherm™ Batls	Manufactured in widths to permit friction fit installation. Unfaced is used with a separate vapor retarder or where no vapor retarder is required or recommended.	(Unfaced) R-4 *(Unfaced, Kraft-faced no tabs) R-11 (Unfaced, Kraft-faced no tabs) R-19 (Unfaced) R-30	2 1/2" 3 1/2" 6 1/4" 10"	Unfaced complies with ASTM C665, Type I, ASTM C665, Type I and is noncombustible, per ASTM E136. Kraft-faced complies with ASTM C665, Type I, Class C, Category 1. Thermal performance determined by ASTM C177 and ASTM C518.
CeramPro™ Partition Batls	Unfaced flexible blanket-type batls for use in commercial construction for concealed and external insulation in shaft and partition walls.	R-5.8	1 1/2"	Complies with ASTM C665, Type I, II, ASTM C665, Type I and is noncombustible, per ASTM E136.
CeramPro™ Thermal Kraft-Faced Batls	Manufactured with a tapered lock paper facing providing a vapor retarder with a perm rating of 1.0 or less.	* R-9 R-19	5 1/2" 6 1/4"	Complies with ASTM C665, Type I and ASTM C665, Type II, Class A, Category 1. Thermal performance determined by ASTM C177 and ASTM C518.
CeramPro™ Thermal Foli-Faced Batls	Manufactured with a tapered foil-faced vapor retarder providing a perm rating of 0.05 or less. Has a flame spread rating of 75 or less.	R-11 R-19 R-23 R-30 R-33	3 1/2" 3 1/2" 6 1/4" 10" 12"	Complies with ASTM C665, Type I and ASTM C665, Type II, Class B, Category 1. Thermal performance determined by ASTM C177 and ASTM C518.
CeramPro™ Thermal FSK-Faced Batls	Manufactured with a tapered, flame-resistant foil-acrylic-kraft facing (FSK). Used where a flame spread rating of 25 or less is required for fire-retardant facing. The facing has a perm rating of 0.02 or less.	R-11 R-19 R-23 R-30 R-33	3 1/2" 3 1/2" 6 1/4" 10" 12"	Complies with ASTM C665, Type I and ASTM C665, Type II, Class A, Category 1. Thermal performance determined by ASTM C177 and ASTM C518.
CeramPro™ Thermal Extended Flange FSK Faced, White & Black FSK Faced Batls	Manufactured with a white or black flame-resistant poly-acrylic-kraft facing (FSK) or flame-resistant foil-acrylic-kraft facing (FSK). Used where a flame spread rating of 25 or less is required for fire-retardant facing. All facing have a perm rating of 0.02 or less and a 4" extended flange.	R-19 (FSK & FSK) R-30 (FSK only)	6 1/4" 10"	FSK & FSK comply with ASTM C665, Type I, Class A, Category 1. Thermal performance determined by ASTM C177 and ASTM C518.
Fiber Glass Building Insulation	Manufactured in widths to permit friction fit installation. Unfaced is used with a separate vapor retarder or where no vapor retarder is required or recommended.	(Unfaced, Kraft Faced) R-4.8	5 1/2"	Unfaced complies with ASTM C665, Type I, ASTM C665, Type I and is noncombustible, per ASTM E136. Kraft-faced complies with ASTM C665, Type I, Class C, Category 1. Thermal performance determined by ASTM C177 and ASTM C518.

Product	Description	Size and Thicknesses	Specification Compliance																																																																																														
CertaPro™ Commercial Board	Flexible to rigid boards for mechanical and commercial construction. Manufactured unfaced, with a reinforced white back and foil backings (A.B.) or an aluminum foil, glass acrylic back backings (FSK).	<table><tr><th colspan="2">CB 150</th><th colspan="2">CB 225</th><th colspan="2">CB 300</th><th colspan="2">CB 600</th></tr><tr><th>INches</th><th>Milimeters</th><th>INches</th><th>Milimeters</th><th>INches</th><th>Milimeters</th><th>INches</th><th>Milimeters</th></tr><tr><td>60</td><td>1 1/2</td><td>38</td><td>1 1/2</td><td>38</td><td>4 1/2</td><td>114</td><td>1 1/2</td><td>38</td></tr><tr><td>80</td><td>2</td><td>51</td><td>1 1/2</td><td>38</td><td>6 1/2</td><td>165</td><td>1 1/2</td><td>38</td></tr><tr><td>100</td><td>2 1/2</td><td>64</td><td>1 1/2</td><td>38</td><td>8 1/2</td><td>216</td><td>1 1/2</td><td>38</td></tr><tr><td>120</td><td>3</td><td>76</td><td>1 1/2</td><td>38</td><td>10 1/2</td><td>267</td><td>1 1/2</td><td>38</td></tr><tr><td>140</td><td>3 1/2</td><td>89</td><td>1 1/2</td><td>38</td><td>12 1/2</td><td>318</td><td>1 1/2</td><td>38</td></tr><tr><td>160</td><td>4</td><td>102</td><td>1 1/2</td><td>38</td><td>14 1/2</td><td>369</td><td>1 1/2</td><td>38</td></tr></table>	CB 150		CB 225		CB 300		CB 600		INches	Milimeters	INches	Milimeters	INches	Milimeters	INches	Milimeters	60	1 1/2	38	1 1/2	38	4 1/2	114	1 1/2	38	80	2	51	1 1/2	38	6 1/2	165	1 1/2	38	100	2 1/2	64	1 1/2	38	8 1/2	216	1 1/2	38	120	3	76	1 1/2	38	10 1/2	267	1 1/2	38	140	3 1/2	89	1 1/2	38	12 1/2	318	1 1/2	38	160	4	102	1 1/2	38	14 1/2	369	1 1/2	38	<table><tr><th>Product</th><th>ASTM C665</th><th>ASTM C665</th><th>ASTM C665</th></tr><tr><th></th><th>Type I</th><th>Type I & II</th><th>Type I & II</th></tr><tr><td>CB 150</td><td>Type I</td><td>Type I & II</td><td>Type I & II</td></tr><tr><td>CB 225</td><td>Type I</td><td>Type I & II</td><td>Type I & II</td></tr><tr><td>CB 300</td><td>Type I & II</td><td>Type I & II</td><td>Type I & II</td></tr><tr><td>CB 600</td><td>Type I & II</td><td>Type I & II</td><td>Type I & II</td></tr></table> ASTM C177 (Type I and Type II) and ASTM C518 (Type I and Type II)	Product	ASTM C665	ASTM C665	ASTM C665		Type I	Type I & II	Type I & II	CB 150	Type I	Type I & II	Type I & II	CB 225	Type I	Type I & II	Type I & II	CB 300	Type I & II	Type I & II	Type I & II	CB 600	Type I & II	Type I & II	Type I & II
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	Available in four densities: CB 150: Lightest weight, best where flexibility is desired. CB 225: Semi-rigid board type. CB 300: Board type with greater rigidity and compressive strength for a smoother more secure resilient surface. CB 600: A rigid board product.		Typ. Type II ASTM C665 Type I																																																																																														

LM 00097

Product	Description	Sizes and Thicknesses				Specification Compliance	
CeramPro™ AcoustiBoard™ Black	Rigid or semi-rigid fiber glass board with a black mat facing for acoustical applications in wall cavities or other acoustically sensitive applications requiring a black exposed surface. Available in two densities: Type 225: Rigid glass board type. Type 300: Board type with greater rigidity and compressive strength for a secondary noise abatement surface.	Type 225		Type 300		Type	ASTM C612
		R-Value	Thickness	R-Value	Thickness	225	Type 1A
		4.3	1"	4.3	1"		
		6.5	1 1/2"	6.5	1 1/2"		
		8.7	2"	8.7	2"	300	Types 1A & 1B

CeramPro™ AcoustiBlanket™ Black	12" to 1" thick black fiber glass blanket with a double fire-retarded black composite surface used for acoustical control applications in theaters, concert studios or other acoustically sensitive applications requiring a black exposed surface.	Type 150	Type 200	Complies with ASTM C663, Type I and II. Acoustical performance determined by ASTM C425 using Type A coupling. Thermal resistance determined by ASTM C177 or C518.		
		Thickness	Thickness			
		1"	5"			

Metal Building Insulation 202-08	Certified Fiberglass Metal Building Insulation 202-08 is a flexible blanket insulation laminated in rolls and intended to be laminated on one side with a suitable vapor retarder. It is used as a thermal and acoustical insulation in the roofs and sidewalls of pre-engineered metal buildings and post frame construction. Plain, un-faced, Metal Building Insulation 202-08 may be used as an additional layer of insulation over laminated metal building insulation in systems or over the top of BUR or single ply roofs in metal roof applications to achieve greater thermal performance.	Type 150				Metal Building Insulation 202-08 has physical properties that regularly meet the requirements of the following specifications: ASTM C581, Type I Plain and NAIMA 202-08, (Rev. 2000)	
		R	Nominal Thickness	Widths	Lengths		
		10	3 1/4"	48", 48", 60", 72"	100'		
		11	3 1/4"	48", 48", 60", 72"	100'		
		13	4 1/4"	48", 48", 60", 72"	75'		
		18	5 1/4"	48", 48", 60", 72"	50'		
		19	6 1/4"	48", 48", 60", 72"	50'		
		25	8"	48", 48", 60", 72"	50'		

Commercial Blanket Insulation	This product is used as a thermal or acoustical insulation in commercial buildings where white rolls of unfaced insulation are needed such as remodeling a warehouse. It is also used in post frame construction. In roofs and sidewalls this product can be used as a second layer over the unfaced side of Metal Building Insulation 202-08. Additionally, it may be installed over old roof decks (BUR and metal) prior to application of a new standing seam roof. Underlayment: This product is not intended to be laminated with vapor retarder facing and does not meet the requirements of NAIMA 202-08.	Type 150				Commercial Blanket Insulation has physical properties that regularly meet the requirements of the following specifications: ASTM C581, Type I and ASTM C663, Type I Plain.	
		R	Nominal Thickness	Widths	Lengths		
		11	3 1/4"	48", 60", 72"	100'		
		19	5 1/4"	48", 60", 72"	50'		
		25	8"	48", 60", 72"	40'		
		30	10"	48", 60", 72"	25'		

Thermal Resistance						
Premium Blowing Wool Products	Description	R-Value	Bags per 1,000 sq. ft.	Minimum weight Pounds per sq. ft.	Minimum Thickness	Applicable Standards
LoxSafe® SP	Fiber Glass Blowing Insulation for pneumatic application in open cells or closed cavities.	50	31.4	0.972	22.00"	Complies with ASTM C794, Type I. Thermal performance is determined by ASTM C527 and ASTM C518.
		49	25.2	0.790	18.60"	
		44	22.4	0.703	16.75"	
		38	19.1	0.591	14.50"	
		30	14.9	0.452	11.75"	
		22	10.8	0.334	8.75"	
		19	9.3	0.289	7.75"	
OPTIMA® System	System including OPTIMA premium fiber glass blowing insulation and OPTIMA non-woven fabric or equivalent.	55	71.0	1.436	13.25" (2 x 14)	Complies with ASTM C794, Type I. Thermal performance is determined by ASTM C527 and ASTM C518.
		47	60.3	1.258	11.25" (2 x 12)	
		39	49.5	1.038	9.25" (2 x 10)	
		30	38.8	0.858	7.25" (2 x 8)	
		21	29.5	0.625	5.50" (2 x 6)	
System™ S	System including System S premium fiber glass blowing insulation, System S blowing machine and System S insulation blowing hose.	46	28.6	0.82	10.25"	Complies with ASTM C794, Type I. Thermal performance is determined by ASTM C527 and ASTM C518.
		44	26.3	0.735	10.00"	
		38	22.5	0.628	10.00"	
		30	17.4	0.487	12.25"	
		22	12.5	0.351	6.25"	
		19	10.8	0.303	8.00"	
		13	7.3	0.21	5.50"	

LM 00098

Guide Specifications for CertainTeed Commercial Fiber Glass Insulation Products

PART 1 - GENERAL

1.01 Summary

A. This section includes commercial building thermal/acoustical insulation for application to:

1. Exterior building walls
2. Interior partition walls, shaft walls, and other interior surfaces
3. Ceiling suspension systems

1.02 Submittals

A. Prepare and submit for approval information as required by the conditions of the contract and Division 1 Submittals sections.

B. Submit product data for each thermal and acoustical insulation product specified.

1.03 Quality Assurance

A. Installers shall be qualified to perform work of this section and shall be experienced in the performance of installation operations as appropriate to the project.

1.04 Delivery and Storage

A. Deliver all insulation materials and accessories to the project site in manufacturer's original, unopened, undamaged packaging, with all identification labels intact. Store in a safe place protected from dust, dirt, moisture and physical abuse before and during installation.

PART 2 - PRODUCTS

2.01 Approved Manufacturer and Products

A. All thermal/acoustical insulation materials shall be in accordance with Division 1 Submittals, manufactured by CertainTeed Corporation, including but not limited to:

1. CertaPro AcoustaTherm Batts, Unfaced or Kraft Faced (no tabs)
2. CertaPro Partition Batts, Unfaced

3. CertaPro Thermal Kraft Faced Batts

4. CertaPro Thermal Foil Faced Batts

5. CertaPro Thermal FSK-25 Faced Batts

6. CertaPro Thermal Extended Flange Batts, FSK Faced

7. CertaPro Thermal Extended Flange Batts, Black PSK Faced

8. CertaPro Thermal Extended Flange Batts, White PSK Faced

9. Building Insulation, Unfaced, Kraft Faced

10. CertaPro Commercial Board, Unfaced, FSK Faced, ASI Faced

11. CertaPro AcoustaBoard Black

12. CertaPro AcoustaBlanket Black

13. Metal Building Insulation 202-96 (Rev. 2000)

14. Commercial Blanket Insulation

B. Where applicable, specify product thicknesses and length/width dimensions so insulation completely fills wall cavities to meet thermal and acoustical performance specifications.

C. Specify type of vapor retarder facing to meet water vapor transmission and fire rating specifications.

2.01 Products and Applications

A. Curtain Wall Insulation:

1. CertaPro AcoustaTherm Batts, Unfaced or Kraft Faced (no tabs)

R-value: _____

2. CertaPro Thermal Kraft, Foil, or FSK-25 Faced Batts

R-value: _____

3. CertaPro Commercial Board, Unfaced, FSK or ASI Faced

R-value: _____

B. Partition Insulation

1. CertaPro Partition Batts, Unfaced

R-value: 5.8

C. Interior Cavity Wall Insulation:

1. CertaPro AcoustaTherm Batts, Unfaced or Kraft Faced

R-value: _____

2. CertaPro Thermal Batts, Kraft, Foil, or FSK-25 Faced

R-value: _____

3. CertaPro Thermal Extended Flange Batts, FSK or PSK Faced

R-value: _____

R-value: _____

D. Insulation over ceiling suspension systems:

1. CertaPro AcoustaTherm Batts, Unfaced or Kraft Faced (no tabs)

R-value: _____

E. Insulation for acoustic control in theaters, sound studios, etc.

1. CertaPro AcoustaBoard Black

R-value: _____

2. CertaPro AcoustaBlanket Black

R-value: _____

F. Insulation for metal building ceiling and side wall applications:

1. CertainTeed Metal Building 202-96 (Rev. 2000)

R-value: _____

2. Commercial Blanket Insulation

R-value: _____

PART 3 - EXECUTION

3.01 Inspection

A. Verify that all insulation may be installed in accordance with project drawings, thermal and acoustical design requirements and fire ratings.

B. Confirm that all exterior and interior wall, partition, and floor/ceiling assembly construction has been completed to the point where the insulation may correctly be installed.

3.02 Installation

B. Install all insulation in compliance with manufacturer's published instructions and good workmanship so that acoustical and thermal performance requirements are met.

3.03 Safety Precautions

A. Properly protect insulation contractor's employees during installation of all insulation. Protection shall include proper attire when handling and applying insulation materials, and shall include but not be limited to gloves, hard hats, disposable dust respirators, and eye protection.

B. Conduct all job site operations in compliance with applicable provisions of the Occupational Safety and Health Act and/or local safety and health codes and regulations.



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LM 00099



INNOVATIONS FOR LIVING®

FOAMULAR® 150 Rigid Foam Insulation



Description

All-purpose foam panel insulation for masonry and other applications.

Owens Corning FOAMULAR 150 extruded polystyrene insulation is ideal for wall furring, perimeter/ foundation, cavity wall, crawl-space, pre-cast concrete, under slab, sheathing and other applications. Owens Corning's patented Hydrovac® process technology makes the unique closed-cell structure of FOAMULAR insulation highly resistant to moisture, retaining its long term R-value* year after year – even following prolonged exposure to water leakage, humidity, condensation, groundwater and freeze/thaw cycling.

Performance Benefits

- High R-value (R-5 per inch of product thickness).*
- Compressive strength of 15 psi.
- Effective resistance against moisture, mildew, corrosion and rot.
- Ease of handling and installation (lightweight, tough, rigid foam panels).

*The higher the R-value, the greater the insulating power. Ask your seller for the latest test on R-values.

- Easy to saw, cut and score.
- Wide selection of sizes and thicknesses.
- Availability in straight, tongue and groove, or scored square edges.
- Compliance with building codes and standards.

Product Applications

High-performance FOAMULAR 150 works to:

- Retard the transmission of water vapor and moisture in masonry walls, helping prevent structural damage.

- Provide insulation in a metal or wood furring system used for masonry or concrete walls.
- Perform below grade in perimeter and foundation applications to complement the insulating sheathing envelope around the building framing.

Resistant to common soils and decay, Owens Corning FOAMULAR retains its insulating performance characteristics even after prolonged exposure to moisture.

Typical Physical Properties¹

Thermal Conductivity - k^2 ($2\frac{1}{2}$ x $1\frac{1}{2}$ x $1\frac{1}{2}$) @ 75°F mean temperature @ 40°F mean temperature	ASTM C 518	0.20 0.18
Thermal Resistance - R^2 , inch/in. ($1\frac{1}{2}$ x $1\frac{1}{2}$ x $1\frac{1}{2}$) @ 75°F mean temperature @ 40°F mean temperature	ASTM C 518	
($1\frac{1}{2}$ x $1\frac{1}{2}$ x $1\frac{1}{2}$) @ 75°F mean temperature @ 40°F mean temperature		
Compressive Strength, ultimate (psi) ²	ASTM D 1621	15.0
Flexural Strength (psi) ³	ASTM C 203	60
Water Absorption (% by volume) ⁴	ASTM C 272	0.10
Water Vapor Permeance (perms) ⁵	ASTM E 96	1.1
Water Activity	—	hydrophobic
Water Capillarity	—	none
Dimensional Stability (% linear change) ⁶	ASTM D 2126	2.0
Linear Coefficient of Thermal Expansion (in/in/°F) ⁷	—	27 x 10 ⁻⁶
Flame Spread ⁸	ASTM E 84	5
Smoke Development ⁹	ASTM E 84	45-175
Oxygen Index ¹⁰	ASTM D 2943	24

¹Properties shown are representative values for 1" thick material based upon most recent product quality audit data.

²Method as required to meet ASTM C378.

³Thermal resistance (R) = k^2 x $1\frac{1}{2}$ x $1\frac{1}{2}$ x $1\frac{1}{2}$ = of a 1" thickness at 5.0 (at 75°F mean temperature), 3.4 (at 40°F).

⁴Value at yield or 10% deflection, whichever occurs first.

⁵Value at yield or 25% deflection, whichever occurs first.

⁶Data ranges from 0.06 to value shown due to the level of precision of the test method.

⁷Actual water vapor permeance data decreases as thickness increases.

⁸Data ranges from 0.0 to value shown.

⁹These laboratory tests are not intended to describe the hazard presented by this material under actual fire conditions.

¹⁰Data from Underwriters Laboratories, Inc., classified. See Classification Certificate U-177.

¹¹ASTM E84 is thickness-dependent, therefore a range of values is given.

LM 00100



HYDROVAC® FOR INSULATION

FOAMULAR® 150 Rigid Foam Insulation

Standards and Codes Compliance

- Recognized by code authorities under Research Reports BOCA 96-24; ICBO 3628; SBOCI PST & ESI 9727A
- Meets HUD/FHA Use of Materials Bulletin No. 71A and ASTM C 578 Type X
- Underwriters Laboratories, Inc., Classification Certificate U-197
- Thermal resistance: 5.0 at 75°F, 5.4 at 40°F mean temperature per 1" thickness (hr x ft² x °F/Btu)

Technical Information

- FOAMULAR insulation is ideal for all buildings under normal temperature conditions, but should not be used in contact with chimneys, heater vents, steam pipes or other surfaces where temperatures exceed 150°F. It is not recommended for applications where sustained temperatures exceed 165°F.
- All construction should be evaluated for the necessity to provide vapor retarders. See current ASHRAE Handbook of Fundamentals.
- Foamular insulation is a non-structural material and must be installed on frameworks which are independently structurally adequate to meet required construction and service loading conditions.

Caution

This product will ignite if exposed to fire of sufficient heat and intensity. During shipping, storage,

installation and use, this product should not be exposed to open flame or other ignition sources. See the conditions of use section of the code evaluation reports for specific applications.

Note

All products described here may not be available in all geographic markets. Consult your local sales office representative for more information.

Product Data

Extruded polystyrene insulation—150 (15 psi)

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FOAMULAR insulation is produced by Owens Corning's patented Hydrovac® process technology. For more information on the Owens Corning family of home building products, contact your Owens Corning dealer, call 1-800-GET-PINK or access our web site: www.owenscorning.com

Extruded polystyrene insulation—150 (15 psi)

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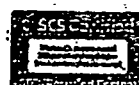
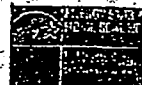
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FOR THE PEOPLE

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המחלקה לביטחון המדינה

10351 Verdón, Rd
- 11-11-1962

Docu. #1, VA 2335
27-88203

09-07-87 / R32-0

المجلس الأعلى للمعاهد العليا

360

Seam & Seal Tape Technical Specifications Sheet

PRODUCT NAME Seam & Seal Tape	IMPERIAL	METRIC
MANUFACTURER Berry Plastics Tapes & Coatings Division 10351 Vardon Road Dorset, VA 23047 T: 877.832.0333 www.govallencecoatingsproducts.com	1" (25.4mm)	0.076mm
PRODUCT DESCRIPTION Arctic liner Berry Plastics Seam and Seal Tape is a thick, strong, white polypropylene film coated with a cold weather acrylic adhesive system. This system is specially formulated to have consistent performance characteristics at sub-freezing temperatures along with good quick stickability for ease in applying. Seam & Seal Tape can be used to repair rips, punctures or tears in the sheathing or housewrap material. This tape can be applied to concrete, masonry, all plastics, etc., to improve air tightness. When applied over the seams of the installed housewrap, Seam & Seal Construction Tape is another component that contributes towards a secondary line of defense against exterior moisture penetration of the wall envelope. By using Seam and Seal Construction Tape, this should result in continuity and assist in creating an effective drainage plane.	10 mil (0.254mm)	0.254mm
Precautions and Limitations: Shelf life - Recommended one year from date of receipt by customer when stored under optimum conditions (70°F, 50%RH).	UV Exposure Rating: 6 months	TECHNICAL SERVICES Support is provided by full-time technically-trained field representatives and telephone service personnel. In addition, Berry Plastics is backed by a research, development and service staff.
Berry Plastics strongly recommends the additional use of an approved flashing material (one that meets or exceeds Fed. Spec. UG-B-790a Grade A and is a minimum 6" in width) around windows and doors. Berry Plastics Seam and Seal Construction Tape by itself, should not be used as a flashing material. When it is used in conjunction with an approved flashing material, this may compromise the wall system's ability to effectively create exterior moisture penetration.	Importance: The physical properties listed herein are typical test results obtained from a series of laboratory tests and should not be used for the purpose of writing specifications. Rather, using this or any product, user shall determine the suitability of the product for particular use, government and industry standards in connection therewith. All test procedures are in accordance with ASTM and PSTC methods.	For further information, literature or technical support, contact Berry Plastics, Tapes & Coatings Division at 804.576.3135.
TECHNICAL DATA - Physical And Chemical Composition: Berry Plastics Seam and Seal Tape is a thick, strong, white polypropylene film coated with a cold weather acrylic adhesive system. Standard Size: 1 1/2" W x 165' L 3" W x 165' L	AVAILABILITY AND COST Availability: Nationwide distribution facilities stock Seam & Seal Tape and provide prompt delivery to most local building material/wholesale dealers. In addition, Berry Plastics field representatives are located in every part of the country to provide the best possible service. Cost: Seam & Seal Tape is competitively priced. For specific information, contact a Berry Plastics Tapes & Coatings representative. WARRANTY Berry Plastics guarantees the manufacturing of Seam & Seal Tape. All products shipped from the manufacturing facility will be free of defects at the time of shipping. MAINTENANCE When applied in accordance with manufacturer's recommendations, Seam & Seal Tape will not require maintenance.	References provided in this bulletin conform to the standard & call records variations and specifications for the installation of Seam & Seal Tape and is presented by good faith. Berry Plastics assumes no liability, expressed or implied, as to the construction, engineering, or workmanship of any project. The information may be considered void, or superseded by other applicable documents. Berry Plastics and its agents are not responsible for any damage or loss from published literature. In writing, prior to application. Contact Berry Plastics, Tapes & Coatings Division for more current product information.  BERRY PLASTICS CORPORATION TAPES AND COATINGS DIVISION 10351 Vardon Road Dorset, VA 23047 877.832.0333 www.govallencecoatingsproducts.com © 2007 Berry Plastics. All rights reserved.

LM 00103

Exhibit 3



February 12, 2010

Mr. Kevin Howell
Precision Walls, Inc.
925 GSP Drive
Greer, SC 29651

RE: Tri County Technical College Occupational Center

Dear Mr. Howell,

This letter is a follow up to my February 8, 2010 e-mail regarding the tape used on the joints of the polystyrene insulation.

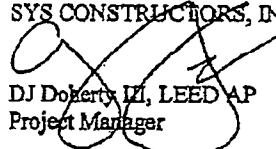
Please be advised that pursuant to Section 1. Scope of Work: of the Subcontract and the other related contract documents, Precision Walls, Inc. ("Precision") agreed to provide a 2" rigid insulation taped and sealed system. As stated in my prior e-mail, we have determined that the tape installed is losing adhesion and is not functioning as required.

As such, pursuant to Section 6: Warranty and Inspection (c): We demand that Precision, at its own expense, immediately replace or correct such defect by making the same comply strictly with all requirements thereof. Pursuant to Section 8. Indemnification: SYS will look to Precision for any costs incurred as a result of remedying this defect. Further, pursuant to Section 2. Price; Payment (g): SYS will withhold an amount sufficient from Precision's pay application to ensure completion of the defective work.

Finally, please be advised that pursuant to Section 12. Termination: You have 48 hours to begin correcting the deficiency. Please provide written correspondence regarding the method of correcting the deficiency in addition to correction of the defect by end of business Tuesday February 16, 2010. Should you fail to do so, SYS will begin correction of the deficiency and will look to Precision for any losses incurred as a result thereof.

Sincerely,

SYS CONSTRUCTORS, INC.


DJ Doherty III, LEED AP
Project Manager

CC: Jeff Gilstrap, SYS Constructors
Rob Moore, SYS Constructors
Chris Stone, Neal Prince Architects
John Crawford, Kenison Dudley & Crawford, LLC

SYS Constructors, Inc. • General Contracting • Commercial • Industrial • Institutional
20 Brozzini Court • Greenville, SC 29615 • Tel. 864/288-3885 • Fax 864/234-7620 • www.sysconstructors.com

Exhibit 4

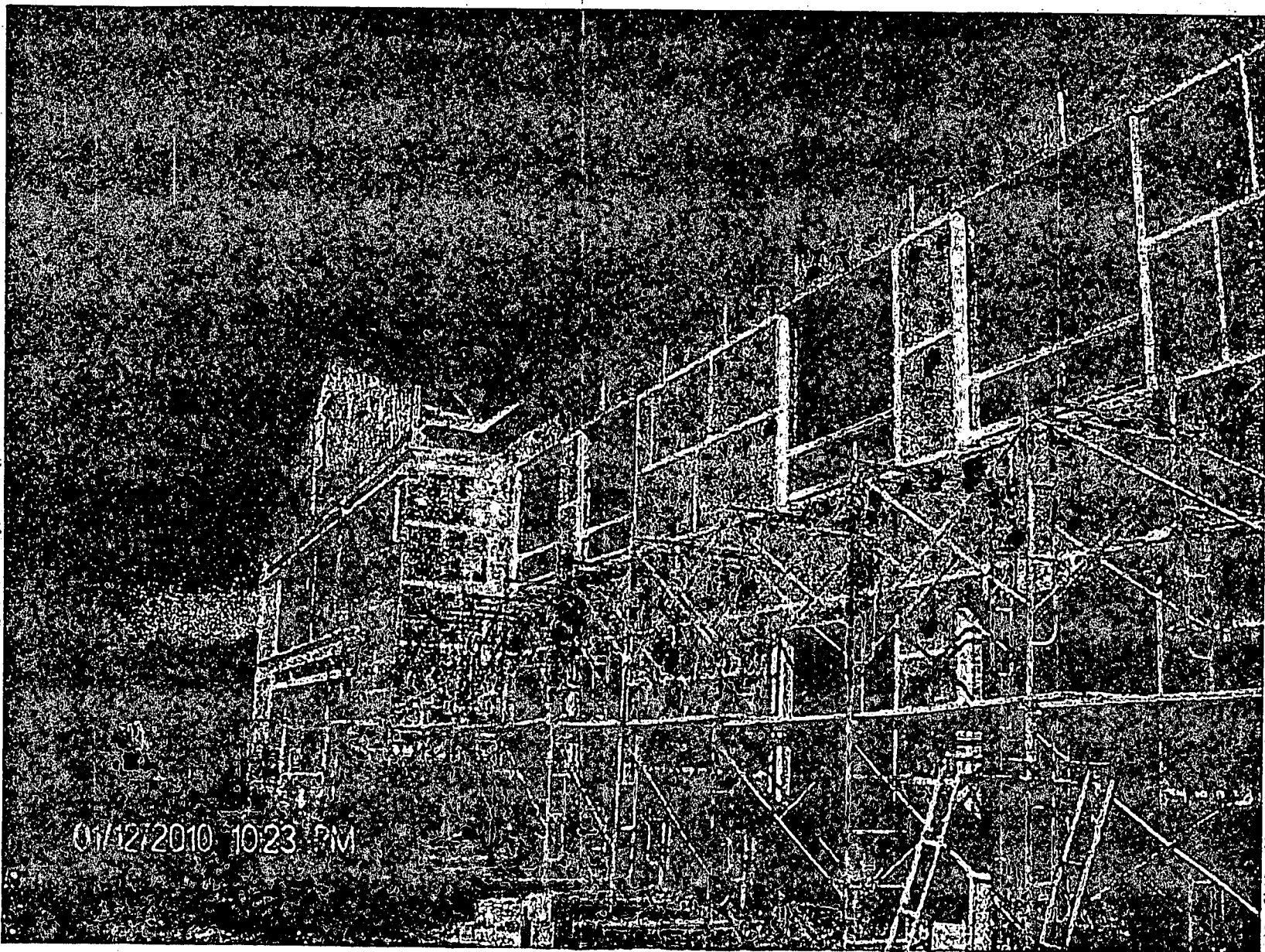


Exhibit 5



Exhibit 6



Exhibit 7



Home Office
20 Brazzini Court
Greenville, SC 29615
Phone 864-288-3315
Fax 864-234-7620

Anderson Office
111-A Benson Street
Anderson, SC 29624-1005
Phone 864-231-7910
Fax 864-231-7911

ENDOR COPY

SUBCONTRACT CHANGE ORDER

Date	Job	Number	Rev
9/27/2010	09-083	09-083.4.14	6
Vendor			
Precision Walls, Inc.			

To:

Precision Walls, Inc.
625 GSP Drive
Greer, SC 29651

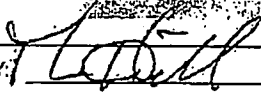
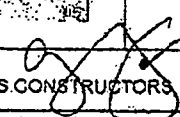
JOB SITE:

Tri-County Tech (Occup Bldg)
1774 Powdersville Road
(State Proj No. H59-9990-GW)
Easley, SC 29642

SYS Constructors, Inc. submits a Change Order for the following changes in work:

Includes a reimbursement of the cost created by the faulty tape on the exterior of the building. Acceptance of this change order represents full and final settlement of all costs and claims, known or unknown, real or imagined, against SYS Constructors and/or the Owner, for the Work, labor or materials, provided under this contract and any amendments thereto, and hereby releases SYS Constructors and the Owner from the same. This does not alter this contractor's obligations under the contract.

Change Order Detail:

DESCRIPTION	AMOUNT
Masonry Demo & Rebuild	-84,427.00
Project Management Time	-10,392.00
Superintendent Time	-9,628.00
Dumpster Bills	-4,500.00
Attorney Fees	-2,000.00
SYS Settlement Agreement	13,345.00
All invoices should reflect corresponding job number & subcontract number.	
All terms and conditions of the original subcontract remain in full effect unless specifically modified here.	
Original Subcontract Amount	\$ 582,587.00
Change by Previous Change Orders	\$ 48,697.00
Net Change this Change Order	\$ (97,500.00)
New Subcontract Amount	\$ 533,784.00
Please note change in procedure. Please sign and return BOTH copies on the attached document. SYS Constructors will return one fully executed copy to your records. If you have questions regarding attached, please contact our office. Do not make changes to this document.	
ACCEPTED BY: 	 SYS.CONSTRUCTORS, INC.

RECEIVED
NOV 01 2011
SYS. CONSTRUCTORS



Home Office
20 Brundini Court
Greenville, SC 29615
Phone 804-238-3385
Fax 804-234-7633

Anderson Division
111-A Benson Street
Anderson, SC 29624-1665
Phone 804-231-7918
Fax 804-231-7911

SUBCONTRACT CHANGE ORDER

Date	Job	Number	Rev
9/27/2010	09-083	09-083.4.14	6
Vendor			
Precision Walls, Inc.			

JOB SITE:

Precision Walls, Inc.
925 GSP Drive
Greer, SC 29651

Tri-County Tech (Occup Bldg)
1774 Powdersville Road
(State Proj No. H58-9990-GW)
Easley, SC 29542

TERMS AND CONDITIONS

1. Subcontractor shall identify to Contractor in writing, the full-time Subcontractor Superintendent, who shall be acceptable to Contractor.
2. Subcontractor shall provide all necessary materials, equipment, labor and supervision to maintain Contractors Master Schedule.
3. Subcontractor shall be responsible for coordination with other trades, in order to maintain schedule and contract requirements.
4. Contractor may modify Master Schedule of which Subcontractor agrees to adjust to revised schedule.
5. Project work hours are Monday - Thursday (7:00 AM - 5:30 PM).
Subcontractor work that may occur outside these stated hours require written permission by the Contractor. Subcontractor may be required to compensate Contractor for overtime Contractor Supervisor.
6. Project work site is under Federal, State, and Local Code and Regulatory Agencies, and Subcontractor is required to adhere to those regulations. Contractor requires each individual to wear hard hats on the project at all times. A Drug-Free atmosphere is required on this project.
7. Shop Drawings and Submittals shall be transmitted to Contractor, in order not to affect delivery date of equipment and materials for Construction Schedule. Submittals shall be stamped by Subcontractor stating that he has reviewed the submittals for compliance of Contract Documents. Shop drawing and Submittal quantities shall be a minimum of four (4) copies each.
8. Invoicing must include Subcontract number and a Partial Release of Lien must accompany each Application for Payment. A Final Release of Lien must be submitted before release of retainage.
9. A current Certificate of Insurance must be on file prior to commencement of work.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

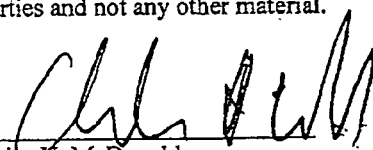
Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Record on Appeal contains all material proposed to be included by any of the parties and not any other material.


Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Appellant

November 6, 2013

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common-Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

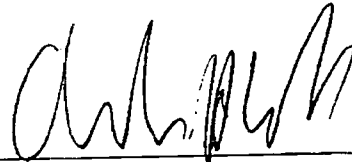
Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

PROOF OF SERVICE

I certify that I have served the Record on Appeal by having a copy hand-delivered to the Respondent's attorney of record, Steven Wayne Ouzts, Turner, Padgett, Graham & Laney, P.A., Bank of America Plaza, 1901 Main Street, 17th Floor, Columbia, SC, 29201.



Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900
Attorneys for Appellant

November 6, 2013

RECEIVED

NOV 06 2013

SC Court of Appeals

APPX 0378

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

FINAL BRIEF OF APPELLANT

Charles H. McDonald
ROBINSON, MCFADDEN & MOORE, P.C.
Post Office Box 944
Columbia, SC 29202
(803) 779-8900

Attorneys for Appellant

November 26, 2013

RECEIVED

NOV 26 2013

SC Court of Appeals

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<i>Standard Fire Co. v. Marine Contracting & Towing Co.</i> , 301 S.C. 418, 421, 392 S.E.2d 460, 461-62 (1990)	6
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STATEMENT OF ISSUES ON APPEAL

- I. Whether the Trial Court erred by narrowly construing the insuring agreement against coverage and broadly construing a policy exclusion to defeat coverage?
- II. Whether the Trial Court erred in finding that tearing down a brick veneer wall was not "physical injury to tangible property" so as to constitute "property damage" as that term is defined in the insurance policy?
- III. Whether the Trial Court erred in finding that in the absence of any evidence of negligent or faulty workmanship by the insured, the loss of adhesion of the insulation joint tape was not an "accident" so as to constitute an "occurrence" as that term is defined in the insurance policy?
- IV. Whether the Trial Court erred in finding that the insurance policy's "Damage to Property" Exclusion, which requires that the insured's work have been incorrectly performed on the damaged property, applied despite the fact that the insured in this case performed no work on the damaged property?

STATEMENT OF THE CASE

Precision Walls commenced this action on March 23, 2011, seeking a declaratory judgment that its loss was a covered claim under the applicable Commercial General Liability (CGL) insurance policy issued by Liberty Mutual Fire Insurance Company. On December 1, 2011, Precision Walls amended its complaint to assert additional causes of action for breach of the insurance contract and violation of S.C. Code Ann. § 38-59-40. Precision Walls voluntarily dismissed its claim for relief under S.C. Code Ann. § 38-59-40 with prejudice and proceeded to trial on its causes of action for a declaration that coverage existed under the CGL policy and for damages for breach of the insurance contract. Precision Walls' claim was for \$97,500.00 together with interest thereon at the prevailing prejudgment rate. Liberty Mutual filed answers to the pleadings asserting defenses that Precision Walls' claim was not covered under the CGL policy. Specifically, Liberty Mutual asserted that the claim did not trigger coverage under the insuring agreement of the CGL policy, and, alternatively, that certain policy exclusions applied to bar coverage.

The parties presented this matter to the trial court based upon a stipulated record setting forth the undisputed facts. The Honorable Letitia H. Verdin conducted a summary bench trial based on the stipulated record on February 6, 2013. The Court filed a Form 4 Order on February 19, 2013, granting judgment in favor of Liberty Mutual which counsel for Precision Walls received on February 22, 2013. On March 4, 2013, Precision Walls filed its Motion for Reconsideration under Rule 59(a), SCRPC, and, alternatively, under Rule 59(e), SCRPC. On April 10, 2013, the Court entered its Form 4

Order denying Precision Walls' Motion for Reconsideration and entering its final order of judgment in favor of Liberty Mutual. Precision Walls received notice of this order on April 12, 2013, and filed its Notice of Appeal on April 16, 2013. On appeal, Precision Walls seeks a reversal of the trial court's order and remand to the lower court for further proceedings consistent with this Court's opinion.

STATEMENT OF FACTS

Precision Walls was a subcontractor to the general contractor, SYS Constructors, Inc., on a project in Easley, South Carolina known as Tri-County Tech Occupational Building (the "Project"). Precision Walls' scope of work included installing light gauge metal framing, building insulation, and "taped & sealed blue board insulation on exterior." (Affidavit of D.J. Doherty, III, ¶ 5, Ex.1; R. p. 333; pp. 337-350)

Precision Walls made submittals for review by SYS Constructors and the project architect relative to certain materials to be used by Precision Walls in the performance of its work. One of the submittals by Precision Walls related to the proposed use of a "Seam & Seal" Tape manufactured by Berry Plastics for use in taping and sealing the joints of the blue board insulation. This submittal was reviewed by the architect for the Project and SYS Constructors without objection and Precision Walls proceeded with taping the insulation joints with the "Seam & Seal" tape. (Doherty Aff. ¶ 6, Ex. 2; R. p. 334; pp. 351-361)

The exterior wall for the Project was brick veneer. SYS Constructors subcontracted with Pride Masonry to provide the labor and materials needed to construct the brick veneer wall. (Doherty Aff. ¶ 7; R. p. 334) Before the brick veneer wall could be constructed, Precision Walls had to install the blue board insulation and tape and seal

each of the joints of the insulation boards. Each insulation board is approximately 4 feet by 8 feet in size which required significant taping and sealing of joints. Precision Walls had nothing to do with the construction of the brick veneer wall, which could only be constructed after Precision Walls had finished its work of installing, taping and sealing the insulation boards. (Doherty Aff. ¶ 8; R. p. 334)

Prior to the completion of the brick veneer wall, SYS Constructors' field personnel observed that some of the tape sealing the joints at the insulation board was losing adhesion and coming loose. Upon further investigation by SYS Constructors, it was observed that tape was also coming loose in areas which were covered by the brick veneer wall. The investigation conducted by SYS Constructors did not determine the reason why the tape was coming loose. (Doherty Aff. ¶ 9; R. pp. 334-335) Further, while Precision Walls did not know why the tape was losing adhesion and coming loose, it believed the problem to be a defect in the tape itself rather than its own workmanship. (Deposition of Kevin Howell at p. 50, lines 1-25, p. 51 Lines 1-4; R. p. 73, lines 1-25; p. 74, lines 1-4)

Taped insulation joints were essential to the integrity of the building envelope and were a requirement for preventing air and moisture intrusion into the interior of the building, among others things. Both the Owner of the Project and SYS Constructors were unwilling to allow unsealed joints to remain behind the brick veneer wall. Accordingly, SYS Constructors directed Precision Walls to comply with its subcontract requirements and provide taped and sealed joints at all locations. (Doherty Aff. ¶ 10, Ex. 3; R. p. 335; pp. 362-363)

The only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick. SYS Constructors engaged its masonry subcontractor to remove the brick veneer wall in place and then build a new wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape. (Doherty Aff. ¶ 11, Exs. 4, 5 and 6; R. p. 335; pp. 364-369) SYS Constructors compiled all of the costs associated with the tape problem and issued a deductive change order to the Precision Walls' subcontract. The original change order prepared by SYS Constructors was in the amount of \$108,845.00. Through negotiations with Precision Walls, SYS Constructors agreed to reduce the amount to \$97,500.00. A final deductive change order in that amount was issued to Precision Walls on or about November 15, 2011. (Doherty Aff. ¶ 12, Ex. 7; R. p. 336; pp. 370-372)

While Precision Walls incurred substantial costs of its own in removing and replacing the defective joint tape, those costs are not a part of the SYS deductive change order. Further, Precision Walls is not seeking indemnity for these costs from Liberty Mutual as Precision Walls recognizes those costs are not covered losses under the CGL policy.

STANDARD OF REVIEW

Because declaratory judgment actions are neither legal nor equitable, the standard of review depends on the nature of the underlying issues. *Auto-Owners Ins. Co. v. Hamin*, 368 S.C. 536, 540, 629 S.E.2d 683, 685 (Ct. App. 2006), *petition for cert. filed*, (S.C. June 16, 2006). When the purpose of the underlying dispute is to determine whether coverage exists under an insurance policy, the action is one at law. *Id.* When an appeal involves stipulated or undisputed facts, an appellate court is free to review whether the

trial court properly applied the law to those facts. *WDW Props. v. City of Sumter*, 342 S.C. 6, 10, 535 S.E.2d 631, 632 (2000). In such cases, the appellate court owes no particular deference to the trial court's legal conclusions. *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 336 S.C. 162, 166, 519 S.E.2d 561, 563 (1999); *see also Duke Power Co. v. Laurens Elec. Coop., Inc.*, 344 S.C. 101, 104, 543 S.E.2d 560, 561-62 (Ct. App. 2001).

ARGUMENT

I. The Trial Court erred by narrowly construing the insuring agreement against coverage and broadly construing a policy exclusion to defeat coverage.

This matter involves the construction and interpretation of a CGL policy under which Precision Walls is the insured and Liberty Mutual is the insurer. Insurance policies are subject to general rules of contract construction. *Fritz-Pontiac-Cadillac-Buick v. Goforth*, 312 S.C. 315, 318, 440 S.E.2d 367, 370 (1994). The court must enforce, not write, contracts of insurance and must give policy language its plain, ordinary, and popular meaning. *Id.* An insurer's obligation under a policy of insurance is defined by the terms of the policy itself and cannot be enlarged by judicial construction. *South Carolina Ins. Co. v. White*, 301 S.C. 133, 137, 390 S.E.2d 471, 474 (Ct. App. 1990). Terms of an insurance policy must be construed liberally in favor of the insured and strictly against the insurer. *Standard Fire Co. v. Marine Contracting & Towing Co.*, 301 S.C. 418, 421, 392 S.E.2d 460, 461-62 (1990) (citations omitted). "Moreover, if the intention of the parties is clear, courts have no authority to change insurance contracts in any particular or to interpolate a condition or stipulation not contemplated either by the law or by the contract between the parties." *Id.*

The burden of proof is on the insured to show that a claim falls within the coverage of an insurance contract while the insurer bears the burden of establishing exclusions to coverage. *Sunex Int'l, Inc. v. Travelers Indem. Co. of Ill.*, 185 F. Supp. 2d 614, 617 (D.S.C. 2001)(citations omitted). Exclusions in an insurance policy are always construed most strongly against the insurer. *Boggs v. Aetna Cas. & Sur. Co.*, 272 S.C. 460, 464, 252 S.E.2d 565, 568 (1979). Additionally, "where there are doubts about the existence or extent of coverage the language of the policy is to be understood in its most inclusive sense." *Auto Owners Ins. Co. v. Langford*, 330 S.C. 578, 584, 500 S.E.2d 496, 499 (Ct. App. 1998).

In this case, the trial court erred by straying from these fundamental principles of construction for insurance contracts. Instead of construing the policy liberally in favor of coverage, the trial court narrowly construed the policy terms in the insuring agreement against coverage. In addition, instead of construing the policy exclusions against the insurer, the trial court broadly construed a policy exclusion beyond its intended application so as to preclude coverage.

II. The Trial Court erred in finding that the facts of this case did not establish the existence of "property damage."

The CGL policy at issue in this case defines "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property. . . ." (Liberty Mutual Ex. 1 at Section V.-Definitions, part 17.a¹; R. p. 235) Applying the plain meaning of the policy definition to the facts in this instance, there is "property damage."

¹ The definitions and exclusions set forth in the CGL policy in this case are the same definitions and exclusions contained in standard CGL policies which South Carolina appellate courts have addressed in prior opinions. See e.g. *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011); *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 192, 684 S.E.2d 541, 543 (2009); *Walde v. Association Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012).

A brick wall (tangible property) was torn down (physical injury). Moreover, the contractor, SYS Constructors, and the Project owner lost the use of an otherwise functioning brick veneer wall. Therefore, the policy definition is satisfied by the undisputed facts of this case.

Rather than engage in an application of the unique facts of this case to the actual policy terms, the trial court regrettably misapplied several prior South Carolina opinions in finding that "property damage" does not exist in this instance.

A. *Crossman* supports a finding of "property damage" on the facts on this case.

In the recent case of *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), the South Carolina Supreme Court, on rehearing, reversed its prior opinion regarding insurance coverage for defective construction. In so doing, the Court reviewed its treatment of insurance coverage for construction claims in prior opinions and stated as follows:

In sum, we clarify that negligent or defective construction resulting in damage to otherwise non-defective components may constitute "property damage," but the defective construction would not.

Id. at 50, 717 S.E.2d at 594. This clarification is particularly instructive in this case. While the issue here is defective construction, rather than negligent construction, it is clear that Precision Walls' claim seeks coverage for damage to other, non-defective components (i.e. the brick veneer wall) and not the defective construction itself (i.e. the joint tape). No part of Precision Walls' claim involves its own costs in removing and replacing the defective joint tape.

Moreover, in *L-J II*, the South Carolina Supreme Court stated that "[t]he CGL policy may, however, provide coverage in cases where faulty workmanship causes a third

party bodily injury or damage to other property, *not in cases where faulty workmanship damages the work product alone.*" *L-J, Inc. v. Bituminous Fire & Marine Ins. Co.*, 366 S.C. 117, 123, 621 S.E.2d 33, 36, n.4 (2005)(emphasis in original); *see also Auto Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 100-101, 682 S.E.2d 857, 866-67 (Ct. App. 2009). Therefore, it is clear that under South Carolina law, CGL policies may provide coverage when defective or faulty workmanship causes third-party property damage.

In its order, the trial court cites *Crossman* in support of the proposition that the cost of repairing or removing defective work is not "property damage" under a standard CGL policy. While this is a correct statement of the holding in *Crossman*, the trial court misapplied this concept to the facts in this instance. Here, it is clear that Precision Walls' claim is not for the repair or removal of defective construction. It is undisputed that no part of Precision Walls' claim is for the cost of removing or replacing the defective tape. Instead, the claim is for the costs related to damage to non-defective components (i.e. the brick veneer wall) which the South Carolina Supreme Court, both in *L-J II* and *Crossman*, has made clear may constitute "property damage." Therefore, based on the facts presented in this case, the trial court erred in finding that Precision Walls' claim was not for "property damage."

B. The trial court misapplied *Walde* to the materially different facts of this case.

In *Walde v. Association Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), the South Carolina Court of Appeals addressed a situation somewhat similar to this case. The primary issue in *Walde* was whether the insurer had a duty to defend its insured against the claims asserted against the insured by the Waldes. *Id.* In order to determine whether the duty to defend existed, the court had to engage in a coverage analysis

focusing on whether the Waldes had made allegations which, if true, would constitute "property damage" under the terms of the applicable CGL policy. *Id.*

In analyzing whether the allegations asserted against the insured raised the possibility of "physical injury to tangible property," the *Walde* court focused on the fact that the necessary remedial measures required that the insured tear down its own work product in order to fix the problem. *See Walde*, 401 S.C. at 442-443, 737 S.E.2d at 637. In other words, once the insured in *Walde* tore down its own work product, the problem was remediated. However, unlike the situation in *Walde*, the removal of the brick wall in this instance was not a remedial measure. There was nothing wrong with the brick veneer wall. It required no remediation. Its destruction did not cure the problem with the defective joint tape. (Affidavit of D.J. Doherty at ¶¶ 9-12; Howell Dep., p. 65, l. 9-16; R. pp. 334-336; R. p. 88, lines 9-16) In this case, the necessary remedial measures were re-taping the insulation joints which was the work of Precision Walls and which forms no part of Precision Walls' claim under the CGL policy. The trial court erred by expanding the reach of remedial measures to the tearing down of the brick veneer wall which was the non-defective work of another subcontractor. This is an overbroad application of the holding in *Walde* and contrary to the fundamental tenet that insurance contracts should be construed broadly in favor of coverage. *See Walde*, 401 S.C. at 439, 737 S.E.2d at 635, quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010).

Another key difference from the facts of *Walde* is that the tearing down of the brick veneer wall in this instance was third-party property damage involving the violation of another's legal right which the *Walde* court found was determinative of the existence

of "physical injury." See *Walde*, 401 S.C. at 442-43, 737 S.E.2d at 637. Precision Walls had nothing to do with the construction of the brick veneer wall. (Doherty Aff. at ¶¶ 7-8; R. p. 334) The brick veneer wall was the property of others and SYS Constructors clearly had the right under its subcontract with Precision Walls to recover the costs of tearing down and rebuilding the brick veneer wall. (Doherty Aff. ¶ 10; R. p. 335) Therefore, in this case, we have third party property damage for which the insured is legally responsible. Conversely, in *Walde*, the contractor partially tore down its own work product as a direct part of the remedial measures. The only damage was to the contractor's own work product done by the contractor himself. See *Walde*, 401 S.C. at 442-43, 737 S.E.2d at 637.

C. *Walde's* definition of "physical injury" within the broader policy definition of "property damage" is contrary to established principles of insurance contract construction and should be reversed.

In its opinion in *Walde*, the Court engaged in an analysis of whether the allegations in the underlying pleadings could be construed to allege "property damage" as defined by the CGL policy at issue. Specifically, the Court focused on defining "physical injury" within the context of the policy definition of "property damage" which is "'physical injury' to tangible property" *Walde v. Association Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012). In so doing, the *Walde* court erroneously adopted an overly restrictive, legalistic definition of the term "physical injury."²

The South Carolina Supreme Court has consistently recognized that the words used in an insurance policy cannot be strained either to defeat coverage that was intended or to extend coverage that was never intended. *E.g., Diamond State Ins. Co. v.*

² Currently, the *Waldes'* Petition for Writ of Certiorari is pending before the South Carolina Supreme Court. One of the grounds on which the *Waldes* seek review is that this Court erred by ignoring precedent and issuing an improper and overly restrictive definition of the term "physical injury."

Homestead Ind., Inc., 318 S.C. 231, 456 S.E.2d 912 (1995); *Torrington Co. v. Aetna Cas. and Sur. Co.*, 264 S.C. 636, 216 S.E.2d 547 (1975). Instead, words in the policy must be given their plain, ordinary, and popular meanings. *E.g.*, *Diamond State*, 318 S.C. at 236, 456 S.E.2d at 915. Even more specific to the circumstances of *Walde* and this case, it is the ordinary meaning as understood by an ordinary person that controls the court's analysis: "terms appearing in insurance policies should be defined according to the ordinary and usual understanding of their significance to the ordinary or common man." *Green v. United Ins. Co. of Am.*, 254 S.C. 202, 174 S.E.2d 400 (1970); *USAA Prop. and Cas. Ins. Co. v. Rowland*, 312 S.C. 536, 435 S.E.2d 879 (Ct. App. 1993) (citing *Green v. United Ins. Co.* for proposition that: "In the absence of a prescribed definition, the term should be defined according to the ordinary and usual understanding of the term's significance to the ordinary person."); *Sunex Intl. Inc. v. Travelers Indem. Co. of Ill.*, 185 F.Supp.2d 614 (D.S.C. 2001) (applying South Carolina law and rejecting plaintiff's interpretation of "infringement of title" to refer to a formal property right where an ordinary person would understand it to mean the title of a work or a name).

In keeping with these rules, the South Carolina Supreme Court has consistently rejected analyses based on technical or industry usage that would vary the plain and ordinary meaning of words as understood by laypersons. A directly applicable example is found in *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004), in which the South Carolina Supreme Court considered the scope of a policy providing coverage for "damages" the insured is "legally obligated to a pay." Relying upon two Fourth Circuit opinions decided under Maryland and South Carolina law, the lower courts held that "damages" did not include sums expended by the insured in

response to a "potentially responsible party" letter issued by the Environmental Protection Agency because such sums were not legal damages resulting from a lawsuit. In reversing the lower courts, the Supreme Court agreed with the opinion in *Bausch & Lomb Inc. v. Utica Mut. Ins. Co.*, 625 A.2d 1021 (Md. 1993), in which Maryland's highest appellate court "flatly rejected" the proposition that the term "damages" is "to be construed in consonance with its 'accepted technical meaning in law.'" *Helena Chem.*, 357 S.C. at 636-637, 594 S.E.2d at 457-458. In rejecting this argument, the South Carolina Supreme Court reaffirmed its adherence to the rule of construing policies using plain and ordinary meanings:

We agree with the reasoning of the *Bausch & Lomb* court. As that court pointed out, the Fourth Circuit's logic contains an inherent paradox: although insurance policy terms are to be construed in their ordinary and usual way, the *Armco* and *Milliken* courts both accorded the term "damages" a narrow, technical meaning. This goes against South Carolina precedent which holds that this Court must give policy language its plain, ordinary, and popular meaning. *E.g., Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 565, 561 S.E.2d 355, 358 (2002).

The plain, ordinary meaning of "damages" is monies paid on an insured's loss, in this case, from property damage. An "ordinary" meaning of the term is not a legalistic one dependent on whether the damages are classified as legal versus equitable.

Helena Chem., 357 S.C. at 638, 594 S.E.2d at 458 (quoting *Bausch & Lomb* holding that "we accord to words their usual and accepted signification. 'Damages' in common usage means the reparation in money for a detriment or injury sustained. The reasonably prudent layperson does not cut nice distinctions between the remedies offered at law and in equity.")

These opinions of the South Carolina Supreme Court stand for a clear rule: if the insurance contract uses common words with plain and ordinary meanings understood by

laypersons, the function of the court is to construe the contract according to those plain and ordinary meanings. Therefore, the *Walde* court erred by adopting a narrow, technical definition of the undefined policy term “physical injury.” There can be no question that an ordinary layperson would consider the tearing down of a brick wall to constitute physical injury to the wall. Moreover, a layperson is unlikely to resort to Black’s Law Dictionary to understand undefined policy terms such as “physical injury” or “injury.”³ By contrast, one of the definitions of “injury” found in the Oxford English Dictionary is “[h]urt or loss caused to or sustained by a person or thing; harm, detriment, damage.” Oxford English Dictionary (2013). It is beyond dispute that any ordinary layperson would consider tearing down a brick wall to constitute “physical harm” or “physical damage.” Therefore, the *Walde* court erred by adopting a narrow and restrictive definition of the undefined policy term “physical injury” in contravention of the long standing policy of construing policy terms broadly in favor of coverage. This Court should take the opportunity now to correct this error and overrule that part of the *Walde* opinion.

III. The Trial Court erred in finding that the facts of this case did not establish an “occurrence” as that term is defined in the insurance policy.

The CGL policy defines “occurrence” as “an accident, including continuous or repeated exposure to substantially the same general harmful conditions.” (Liberty Mutual Ex. 1 at Section V.-Definitions, part 13; R. 234) The policy does not define the term “accident.” Within the context of a CGL policy, the South Carolina Supreme Court has

³ The *Walde* court inexplicably referred to Black’s Law Dictionary for the definition of “injury” when the term “physical injury” is also defined in this dictionary. See *Black’s Law Dictionary* 1032 (6th Ed. 1990)(defining “physical injury” as “Bodily harm or hurt, excluding mental distress, fright or emotional disturbance. See also Physical Harm.”) Black’s defines “physical harm” as follows: “[t]he words ‘physical harm’ are used throughout the Restatement of Torts to denote the physical impairment of the human body, or of land or chattels.” *Id.* Therefore, tearing down a brick wall would certainly constitute physical impairment of land or chattels.

defined "accident" as "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *E.g. Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 192, 684 S.E.2d 541, 543 (2009); *Auto Owners Ins. Co. v. Rhodes*, 385 S.C. 83, 100, 682 S.E.2d 857, 867 (Ct. App. 2009). Under the undisputed facts of this case, it is clear that the loss of adhesion of the joint tape was an accident. The Berry Plastics Seam & Seal tape was approved for use in taping the insulation board joints and there is no evidence that the tape was applied improperly. Neither SYS Constructors nor Precision Walls knows why the tape lost its adhesion and came loose. These events fall squarely within any accepted definition of the word "accident" and establish that an "occurrence" has taken place for purposes of satisfying this element of the insuring agreement of the CGL policy. Moreover, after the South Carolina Supreme Court's recent pronouncement in *Crossman* that the standard CGL policy definition of "occurrence" is ambiguous and must be construed in favor of the insured, the error in the trial court's finding that no "occurrence" existed in this instance is even further magnified. *See Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594 (2011).

Regrettably, as it did in the case of analyzing "property damage," the trial court again mischaracterizes Precision Walls' claim as seeking coverage for repairing Precision Walls' own "non-conforming work." (Order at p. 5.; R. p. 11) As set forth above, the claim is for a loss arising from third-party property damage that Precision Walls was legally obligated to pay to SYS Constructors. It does not include Precision Walls' own costs for removing and replacing the joint tape which constituted non-conforming or defective work on the part of Precision Walls. No part of the deductive change order

which is the basis for Precision Walls' claim is for removing and replacing the defective or non-conforming joint tape.

The trial court also errs in relying on the out-dated analysis of what constitutes an "occurrence" set forth in *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005). After *Crossman* and *Newman*, the validity of the "occurrence" analysis in *L-J* is highly questionable. For example, the *L-J* court held that negligent acts constituting faulty workmanship did not constitute an occurrence. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 123, 621 S.E.2d 33, 36 (2005). However, in its later opinion in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 196, 684 S.E.2d 541, 545-46 (2009), the South Carolina Supreme Court held that "the negligent application of stucco resulted in an 'occurrence'" Moreover, as set forth above, the *Crossman* court found the term "occurrence" to be ambiguous and one that had to be construed in favor of the insured. See *Crossman supra*. Regardless, this case does not involve allegations of negligent construction or faulty workmanship which were fundamental to the *L-J* Court's determination that no "occurrence" existed. Here, there are no allegations, and certainly no evidence, that Precision Walls' was negligent or that its workmanship was faulty. To the contrary, the evidence leads to only one logical conclusion: the joint tape's loss of adhesion was purely an "unexpected happening or event" which constitutes an "accident" for purposes of the "occurrence" analysis.

IV. The Trial Court erred in finding that the insurance policy's "Damage to Property" Exclusion applied.

The exclusion referred to by the trial court as the "Damage to Property" exclusion, state as follows:

2. Exclusions

This insurance does not apply to:

j. Damage to Property

“Property Damage” to:

(6) that particular part of any property that must be restored, repaired, or replaced because “your work” was incorrectly performed on it.

(Liberty Mutual Ex. 1—Section I—Coverages, part 2—Exclusions-subpart j; R. pp. 224-225)

In its analysis relating to the applicability of the “Damage to Property” exclusion, the trial court does not even attempt to apply the facts of this case to the exclusion. This is a glaring omission because to do so readily demonstrates that this exclusion has no applicability to Precision Walls’ claim. In order for policy exclusion “(j)(6)” to bar coverage, the insured’s work must have been incorrectly performed on the property that has to be replaced. In this case, the property that suffered damage and required restoration was the brick veneer wall. Because the brick veneer wall was constructed after Precision Walls installed the exterior insulation board and applied Seam and Seal tape to the joints, Precision Walls performed no work on the brick veneer wall itself. (Doherty Aff.; R. pp. 333-336) Therefore, because Precision Walls performed no work on that particular part of the property that was damaged, the “Damage to Property” exclusion cannot apply by its express terms. Under the facts of this case, to construe this exclusion otherwise would require ignoring its plain and obvious meaning and would further require a broad, expansive interpretation of the policy exclusion in favor of the insurer. Neither interpretation is a proper construction of an insurance policy exclusion. *See Walde*, 401 S.C. at 439, 737 S.E.2d at 635, *quoting M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010) (“[p]olicies are construed in

favor of coverage, and exclusions in an insurance policy are construed against the insurer.”)

The trial court relies upon *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002), as being dispositive on the issue of whether policy exclusion “(j)(6)” bars coverage. As a threshold matter, the continuing validity of *Century Indemnity* is questionable. In *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), the South Carolina Supreme Court overruled *Century Indemnity* without limitation. Second, even if *Crossman* did not overrule *Century Indemnity* in its entirety, the opinion in *Century Indemnity* cannot be reconciled with the South Carolina Supreme Court’s later opinion in *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 196, 684 S.E.2d 541, 545-46 (2009). In *Newman*, the South Carolina Supreme Court held that property damage to the framing and exterior sheathing behind an improperly installed synthetic stucco exterior was a covered loss under the CGL policy. *Id.* In stark contrast, under an almost identical factual scenario, the South Carolina Supreme Court held in *Century Indemnity* that the GCL policy did not cover damage to the home’s substrate and framing caused by an improperly installed synthetic stucco exterior. Notably, while the *Crossman* court overruled *Century Indemnity*, it specifically stated that it “elected to adhere to our precedent in *Newman*.” *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594, n.6 (2011). Therefore, it would appear that *Century Indemnity* has little to no precedential value after *Newman* and *Crossman*.

Regardless, even if there is any continuing validity to the analysis in *Century Indemnity*, the facts in this case are very different than those in that case. *Century Indemnity* involved a synthetic stucco exterior incorrectly installed on exterior framing and substrate. See *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002). Therefore, the facts of *Century Indemnity* supported the conclusion of the court that the property that had to be repaired or replaced (i.e. the exterior substrate and framing) was excluded from coverage by the “faulty workmanship” exclusion because the insured’s work was incorrectly performed on it. See *id.* Here, the exact opposite situation is presented. The brick veneer wall had to be torn down, not because Precision Walls’ work had been performed on it, but because it had to be removed in order for Precision Walls to have access to repair its own defective work. Moreover, there is no evidence in this case that Precision Walls’ incorrectly or improperly performed its work with respect to applying the joint tape to the exterior insulation boards. Instead, the record in this case strongly supports the conclusion that the joint tape’s loss of adhesion was caused by a defect with the tape itself rather than the workmanship of Precision Walls in installing the tape. Lastly, another important distinction is that in this case, the claim involves physical damage to the property of others rather than damage to the insured’s own work.

The trial court also cited this Court's recent opinion in *Walde* as support for its finding that Precision Walls' claim is barred by policy exclusion "(j)(6)". While the trial court's order simply cited *Walde's* reference to *Century Indemnity*⁴, *Walde's* analysis of policy exclusion "(j)(6)" is instructive in this instance. Unlike the trial court in this instance and the South Carolina Supreme Court in *Century Indemnity*, the *Walde* court actually engaged in an application of the underlying facts to the plain language of the policy exclusion. In so doing, the *Walde* court held that the "(j)(6)" policy exclusion applied to bar coverage because the property damage was to that particular part of the property on which the insured incorrectly performed its work. *Walde*, 401 S.C. at 447, 737 S.E.2d at 639. In *Walde*, the property damage that had to be replaced (i.e. the walls and roof of the offending upstairs apartment) was the insured's own work. Therefore, the *Walde* court correctly found that the property damage was excluded by policy exclusion "(j)(6)" because it constituted "that particular part of property that must be replaced because [the insured's] permitting work was incorrectly performed on it." *Id.* However, in this instance, because Precision Walls performed no work on the brick veneer wall (i.e. the property damage) which was installed after Precision Walls had already performed its relevant work, the "(j)(6)" exclusion cannot apply.

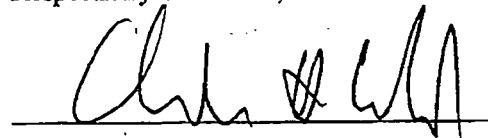
CONCLUSION

Applying a straightforward analysis of the undisputed facts to the plain policy terms establishes coverage under the CGL policy. Moreover, using the same analysis, it is clear that no policy exclusions apply to remove coverage. Therefore, the trial court

⁴ *Walde* contains a parenthetical summary of the purported holding in *Century Indemnity* with respect to the application of the "faulty workmanship" exclusion in the standard CGL policy. *Walde*, 401 S.C. at 447, 737 S.E.2d at 639. However, this parenthetical is an overbroad summary of the actual holding in *Century Indemnity* and the trial court's reliance on same is, therefore, misplaced. See *Century Indemnity*, 348 S.C. at 566-67, 561 S.E.2d at 358-59.

erred in finding that the facts of this case did not establish "property damage" or an "occurrence." The trial court further erred by finding that the CGL policy's "Damage to Property" exclusion otherwise applied to bar coverage. For these reasons, the ruling of the trial court should be reversed and this case remanded to the trial court for a determination of whether the "occurrence" caused the "property damage" and the amount of Precision Walls' covered loss under the CGL policy.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Charles H. McDonald", is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

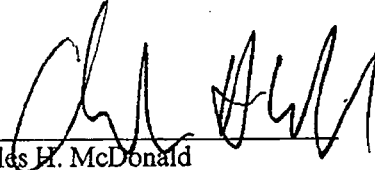
Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Brief complies with Rule
211(b), SCACR.


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November 26, 2013

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APPX 0404

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

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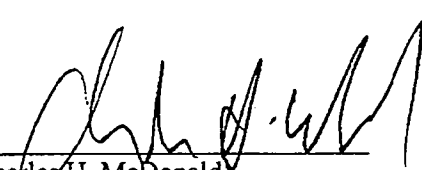
Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

PROOF OF SERVICE

I certify that I have served the Final Brief of Appellant by having a copy hand-delivered to the Respondent's attorney of record, Steven Wayne Ouzts, Turner, Padgett, Graham & Laney, P.A., Bank of America Plaza, 1901 Main Street, 17th Floor, Columbia, SC, 29201.


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APPX 0405

THE STATE OF SOUTH CAROLINA

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STATEMENT OF ISSUES ON APPEAL

- I. Did the trial court correctly apply the proper standards of contract construction to ascertain and give legal effect to the intentions of the parties as determined by the clear and unambiguous language of the insurance policy?
- II. Did the trial court correctly find that deductions charged by the general contractor against Appellant's subcontract price for the costs of removal and replacement of brick veneer in order to remedy a deficiency in the Appellant's work underneath are not "property damage" as defined in the insurance policy?
- III. Did the trial court correctly find that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage," such damage did not result from an "occurrence" as defined in the insurance policy?
- IV. Did the trial court correctly find that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage" resulting from an "occurrence," such damage was excluded from coverage by Exclusion "j(6)"?
- V. Should the judgment of the trial court be affirmed under Rules 208(b)(2) and 220(c) SCACR because it appears from the Record on Appeal that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage" resulting from an "occurrence," such damage was excluded from coverage by Exclusion "m"?

STATEMENT OF THE CASE

Precision Walls, Inc. ("Precision Walls") commenced this action on March 23, 2011 by the filing of a Summons and Complaint, which was later amended on December 1, 2011. The Amended Complaint alleged claims for declaratory judgment, breach of contract, and unreasonable refusal to pay insurance benefits in violation of S.C. Code Ann. § 38-59-40. The claims arose out of the denial of coverage by Liberty Mutual Fire Insurance Company ("Liberty Mutual") for certain losses claimed by Precision Walls under commercial general liability policy number TB2-651-287492-029 (the "Policy") issued by Liberty Mutual to Precision Walls for the period from September 30, 2009 to September 30, 2010. Specifically, Precision Walls contends it is entitled to coverage for a loss of \$97,500.00 incurred because of a deduction charged against Precision Walls' subcontract by the general contractor for costs incurred for the correction of Precision Walls' deficient insulation work on a construction project in Easley, South Carolina known as Tri-County Tech Occupational Building (the "Project").¹

Liberty Mutual answered the Complaint and Amended Complaint, asserting that the losses claimed by Precision Walls are not covered under the insuring agreement and, alternatively, are excluded from coverage. After a period of discovery, Liberty Mutual filed a motion for summary judgment and incorporated memorandum of law on February 20, 2012 based upon the pleadings, the deposition of Kevin Howell, Precision Walls' answers to interrogatories, and numerous exhibits filed with the trial court. Thereafter,

¹ Precision Walls also alleged it was entitled to interest at the prevailing legal rate from the date of the claim, but it made no argument or showing in the trial court to support such a claim. Liberty Mutual denied the allegations. *See, Vaughn Development, Inc. v. Westvaco Development Corp.*, 372 S.C. 576, 642 S.E.2d 757 (Ct. App. 2007)(trial court erred in awarding pre-judgment interest when scope and extent of work under construction contract were uncertain).

on or about April 10, 2012, Precision Walls filed a motion for partial summary judgment, with a memorandum of law, based upon an affidavit of D.J. Doherty, III, the deposition of Jonathan Williams, the deposition of Kevin Howell, and related exhibits. Liberty Mutual filed a memorandum in opposition to Precision Walls' motion.

Both motions came before the Greenville County Court of Common Pleas for a hearing on May 7, 2012. At the hearing, Precision Walls agreed to a dismissal, with prejudice, of the Third Cause of Action of its Amended Complaint, which alleged a statutory claim for attorney fees and costs under S.C. Code Ann. § 38-59-40, leaving only its claims for declaratory relief and breach of insurance contract. With respect to Precision Walls' claims for declaratory judgment and breach of contract, both parties agreed the material facts were undisputed, but disagreed as to the proper interpretation and effect of the applicable law. Nonetheless, in a written Form 4 order filed May 14, 2012, the trial court denied both motions for summary judgment on the grounds there were material questions of fact.

Before the next non-jury term of court, Liberty Mutual and Precision Walls reached an agreement to submit the case for decision based upon the same factual record and legal memoranda previously submitted with their summary judgment motions, except for Precision Walls' claim under S.C. Code Ann. § 38-59-40, which had been voluntarily dismissed with prejudice. The parties also agreed that any issues of fact regarding the remaining claims would be determined by the court, as trier of fact, based upon the same evidence submitted on summary judgment.

In light of this procedural background and stipulated record, Liberty Mutual filed a motion and supplemental memorandum on January 29, 2013 requesting involuntary

dismissal of the action under SCRCF 41(b) and entry of judgment in favor of Liberty Mutual under SCRCF 52. Precision Walls filed a motion for judgment as a matter of law and supplemental memorandum on January 30, 2013. The supplemental memoranda were filed by agreement of counsel specifically to address two cases that were decided after the filing of the parties' respective summary judgment motions: *Walde v. Association Ins. Co.*, Op. No. 5061, Shearouse Advance Sheets (filed December 12, 2012) and *Harleysville Mut. Ins. Co. v. State of South Carolina*, Op. No. 27189, Shearouse Advance Sheets (filed November 21, 2012). Otherwise, previously filed memoranda were incorporated by reference.

Thus the matter came before the Honorable Letitia H. Verdin on February 6, 2013. On February 19, 2013, the trial court filed a Form 4 order granting judgment in favor of Liberty Mutual. Precision Walls filed a motion for reconsideration under Rule 59(a) and, alternatively, Rule 59(e), SCRCF on March 4, 2013. On April 10, 2013, the trial court denied Precision Walls' motion for reconsideration in a Form 4 order and entered a separate order granting final judgment in favor of Liberty Mutual. Precision Walls filed its notice of appeal on April 16, 2013.

STATEMENT OF FACTS

Precision Walls was a subcontractor to SYS Constructors, Inc. ("SYS") on the Project. (Subcontract, R. pp. 338-350). For a one-year period during the Project, from September 30, 2009 to September 30, 2010, Precision Walls was insured under the Policy. (Policy, R. pp. 158-237)

The scope of work to be performed by Precision Walls was described as follows in the subcontract:

"Scope of work includes all material, labor, equipment and supervision of the following: all light gauge metal framing of walls, roof trusses and decking, building insulation, densglass on exterior, taped and sealed blue board insulation on exterior, installation of door frames. . . . Exterior insulation to be sealed so as to prevent air infiltration."

(Subcontract, Section 2, R. p. 338). The Subcontract Price was \$582,587.00 "for the full and complete performance of the work in accordance with SYS Terms and Conditions."

(Subcontract, Section 3, R. p. 338).

Section 6 of the subcontract sets forth certain express warranties made by Precision Walls, in pertinent part, as follows:

"(a) The Subcontractor expressly warrants that all materials, work and equipment incorporated in the Work shall conform to the specifications, drawings, samples and other descriptions set forth in the Subcontract and the Contract Documents and will be of good materials and workmanship and free from defect and warrants that all materials and equipment are both merchantable and fit for the purposes for which they are intended to be used under the Contract Documents. . . . Upon receipt of written notice from Contractor or Owner of any breach of warranty during the applicable warranty period, Subcontractor shall correct the affected work and all costs incurred as the result of breach of warranty shall be borne by Subcontractor. Should Subcontractor fail to make the necessary correction promptly, Contractor may perform or cause to be performed the necessary work at Subcontractor's expense. . . ."

(Subcontract, Section 6, R. p. 341).

D.J. Doherty, III, Project Manager for SYS, referred to Section 6 as the basis for directing Precision Walls to correct a deficiency in insulation joint tape supplied and installed by Precision Walls. On February 12, 2010, Mr. Doherty wrote Kevin Howell,

Project Manager for Precision Walls, a letter concerning the issue, stating in pertinent part as follows:

"Please be advised that pursuant to Section 1. Scope of Work: of the Subcontract and the other related contract documents, Precision Walls, Inc. ("Precision") agreed to provide a 2" rigid insulation taped and sealed system. As stated in my prior e-mail, we have determined that the tape installed is losing adhesion and is not functioning as required.

As such, pursuant to Section 6: Warranty and Inspection (c): We demand that Precision, at its own expense, immediately replace or correct such defect by making the same comply strictly with all requirements thereof.

...
(Letter from D.J. Doherty, III to Kevin Howell (2/12/2010), R. p. 363). The letter instructed Precision Walls to provide a method of correcting the deficiency and to begin corrective measures by the end of business Tuesday, February 16, 2010, failing which, "SYS will begin correction of the deficiency and will look to Precision for any losses incurred as a result thereof." (Letter, R. p. 363).

The deductive change order for which Precision Walls seeks reimbursement under the Policy was for costs incurred by SYS and back-charged to Precision Walls for the removal of brick veneer in some sections of the wall in order to gain access to the insulation joints underneath in order to correct the tape deficiency. The change order was first issued by SYS on September 27, 2010, after completion of the remedial work, (Unexecuted Change Order, R. p. 155), but not accepted by Precision Walls until

November 2011, after significant modifications. (Executed Change Order, R. p. 371).

The change-order work is described in the Doherty Affidavit.²

Paragraph 5 of Mr. Doherty's Affidavit sets forth the scope of work of Precision Walls' subcontract, which, in part, required Precision Walls to provide "taped & sealed blue board insulation" on exterior wall framing. Paragraph 9 describes how it was determined prior to completion of the brick veneer over the insulation that "some of the tape sealing the joints at the insulation board was losing adhesion and coming loose" and "that tape was also coming loose in areas which were covered up by the brick veneer wall." In paragraph 10, Mr. Doherty explains that "[b]oth the Owner of the Project and SYS Constructors were unwilling to allow unsealed joints to remain behind the brick veneer wall," and "[a]ccordingly, SYS Constructors directed Precision Walls, Inc. to comply with its subcontract requirements and provide taped and sealed joints at all locations." Paragraph 11 explains that "[t]he only feasible way to access the areas where tape was coming loose behind the brick veneer wall was to remove the brick," and "SYS Constructors engaged its masonry contractor to remove the brick veneer wall in place and then build a new brick veneer wall once Precision Walls had removed the tape in place and sealed the insulation joints with new tape." Finally, as explained in paragraph 12, the deductive change order that is the basis for Precision Walls' claim is for the cost of the demolition and rebuilding of the brick veneer by the masonry subcontractor, including additional project management and supervision time associated with the masonry work, dumpster bills, and attorney fees, totaling \$97,500.00 after a cost reduction negotiated between SYS Constructors and Precision Walls.

² See also, Precision Walls' Answers to Liberty Mutual's Interrogatories 8 and 9. (R. pp. 241-42).

When SYS directed the removal of the brick veneer it was fully intact and there was no damage, according to the testimony of Precision Walls' Project Manager, Kevin Howell. (Deposition of Kevin Howell, R. p. 67, lines 11-17). The only reason SYS required the removal of the brick veneer was to allow access to the insulation board underneath so the seal tape could be replaced. (*Id.* at R. p. 88, lines 9-16). There was nothing wrong with the brick veneer itself. (*Id.*)

Precision Walls admits that the costs it incurred in removing and replacing the deficient joint tape "are not covered losses under the CGL policy" and it makes no claim for those losses. (Amended Initial Brief of Appellant, p. 5). It also admits that the removal and replacement of the brick veneer was necessary only as a means to correct its deficient work, i.e. the insulation tape, but it seeks to carve out the costs of the masonry work to pursue a claim under the Policy.

Liberty Mutual conducted an investigation of Precision Walls' claim under a full reservation of all rights under the Policy, including the right to deny coverage if warranted by the facts. (Letter from J.J. Williams to Gerry Golt (4/5/2010), R. pp. 243-46). After confirming there was no physical injury to the brick veneer, Liberty Mutual denied coverage and so notified Precision Walls by letters of J.J. Williams dated November 19, 2010 and January 12, 2011. (Letters, R. pp. 247-50 and pp. 252-54).

STANDARD OF REVIEW

In a declaratory judgment action, the standard of review is determined by the nature of the underlying issue. *Crossman Communities of North Carolina, Inc. v. Beazer Homes Investment Corp.*, 395 S.C. 40, 46-47, 717 S.E.2d 589, 593 (2011). When the purpose is to determine whether coverage exists under an insurance policy, the action is

one at law. *Id.* “In an action at law tried without a jury, the appellate court will not disturb the trial court’s findings of fact unless there is no evidence to reasonably support them.” *Id.* (internal quotations and citation omitted). In cases where the facts are stipulated or undisputed, the standard of review on appeal is plenary and without deference to the trial court. *Id.*

This is an action at law tried without a jury based upon an agreed factual record. It appears the facts are undisputed, but to the extent the trial court made findings of facts, such findings should not be disturbed on appeal unless there is no evidence reasonably to support them. Otherwise, the standard of review of questions of law is plenary.

ARGUMENT

- I. The trial court correctly applied the proper standards of contract construction to ascertain and give legal effect to the intentions of the parties as determined by the clear and unambiguous language of the insurance policy.

The general rules of contract construction apply to insurance policies. *M&M Corp. of South Carolina v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010). The cardinal rule is to ascertain and give legal effect to the parties’ intentions as determined by the contract language. *McGill v. Moore*, 381 S.C. 179, 185, 672 S.E.2d 571, 574 (2009). When the language of the contract is clear and unambiguous, the language alone determines its force and effect. *Id.* It is the responsibility of the courts to enforce, not write, contracts of insurance, and the language must be given its plain, ordinary and popular meaning, except with technical language or where the context requires another meaning. *M&M Corp.*, 390 S.C. at 259, 701 S.E.2d at 259. The meaning of a particular word or phrase is not determined by considering the word or phrase by itself, but by reading the policy as a whole and considering the context and

subject matter of the insurance contract. *Schulmeyer v. State Farm Fire & Cas. Co.*, 353 S.C. 491, 495, 579 S.E.2d 132, 134 (2003).

It is evident from the order granting judgment for Liberty Mutual that the trial court adhered to these general principles of contract construction. Moreover, the order and judgment are supported by authoritative South Carolina precedent construing the same or similar policy language in the same way, giving effect to the intention of the contracting parties according to clear and unambiguous language of the Policy.

II. The trial court correctly found that deductions charged by the general contractor against Appellant's subcontract price for the costs of removal and replacement of brick veneer in order to remedy a deficiency in the Appellant's work underneath are not "property damage" as defined in the insurance policy.

The Policy's insuring agreement states, in pertinent part, as follows:

"1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies. . . .

b. This insurance applies to 'bodily injury' and 'property damage' only if:

(1) The 'bodily injury' or 'property damage' is caused by an 'occurrence' that takes place in the 'coverage territory';
....

(Policy, Section I – Coverages, part 1 - Insuring Agreement, a. and b., R. p. 221).

A threshold issue in a case like this one is whether or not the insured's claim meets the Policy definition of "property damage". See, *Crossman*, 395 S.C. at 49, 717 S.E.2d at 594 ("[I]t is only after 'property damage' has been alleged that the question of 'occurrence' is reached."). Precision Walls seeks coverage based upon subpart "a" of the

definition, according to which the term “property damage” is defined as “[p]hysical injury to tangible property, including all resulting loss of use of that property.” (Policy, Section V.- Definitions, part 17. a., R. p. 235). Precision Walls conceded at trial that subpart b. of the Definition does not apply. (Transcript, p. 12, (February 6, 2013), R. p. 117, lines 2-10).

In *Walde v. Association Ins. Co.* this Court gave an unequivocal answer to the question of whether or not losses such as those claimed by Precision Walls are “physical injury to tangible property”. *Walde v. Association Ins. Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), *rehearing denied (February 26, 2013)*, *petition for certiorari pending*. *Walde* held that the costs of a contractor’s partial demolition of a new barn and apartment building then under construction in order to bring the building into compliance with county zoning ordinances did not constitute “physical injury to tangible property” under a commercial general liability (“CGL”) insurance policy. The word “injury,” the court said, generally means the violation of another’s right. *Walde*, 401 S.C. at 443, 737 S.E.2d at 637. The court reasoned that the partial demolition of the barn done under the direction of the owner for remedial purposes was not an “injury” as commonly understood. *Id.* Consequently, the court held, “the Waldes’ allegation that the barn had to be partially torn down to make it comply with Aiken’s regulations does not raise the possibility of ‘physical injury to tangible property.’” *Id.*

Similarly, in this case, it is undisputed that the only loss claimed by Precision Walls is the contractual liability it incurred because of the tear-down and reconstruction of an otherwise intact brick veneer at the direction of the Project owner and general contractor for the remedial purpose of bringing the work of Precision Walls into

compliance with subcontract specifications. One need only read the Doherty Affidavit for substantiation of that fact.

Precision Walls argues that *Walde* was wrongly decided and quibbles with the *Walde* court's construction of the word "injury." According to the Oxford English Dictionary, however, the primary definition of the word injury is "[w]rongful action or treatment; violation or infringement of another's rights; suffering or mischief willfully and unjustly inflicted. . . . A wrongful act; a wrong inflicted or suffered." 7 J.A. Simpson & E.S.C. Weiner, THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) at 981.

Precision Walls also fails in its fruitless attempt to undermine *Walde* by analogy with *Helena Chem. Co. v. Allianz Underwriters Ins. Co.*, 357 S.C. 631, 594 S.E.2d 455 (2004). In that case, the court was concerned about an interpretation of the word "damages" that would have presumed a person of ordinary understanding to possess legal knowledge sufficient to make technical distinctions between legal and equitable remedies. See, *Helena Chem. Co.*, 357 S.C. at 638, 594 S.E.2d at 458 (ordinary meaning is not dependent upon whether "damages" are classified as legal versus equitable). Unlike *Helena Chem. Co.*, in this case the plain, ordinary, and popular meaning of the word "injury" as a "wrong" or "violation of a right" is undoubtedly within the ken of common understanding. No legalistic distinctions are involved.

Moreover, *Walde* does not stand in isolation. Other authorities in South Carolina and elsewhere have consistently held that the cost of removal and replacement of defective material installed in a building simply to bring the building into compliance with contractual specifications is not "physical injury to tangible property."

For example, in *Crossman, supra*, the court drew a critical distinction between the costs of repairing or removing defective work, which the court said was not “property damage” and, therefore, not covered under a commercial general liability policy, and the cost of repairing consequential damage caused by the defective work, which may be. The “property damage” for which the court found coverage in *Crossman* was progressive physical damage to interior elements of the building caused by water intrusion through improperly installed exterior siding. On the other hand, the costs to repair the defective construction were not covered “property damage.” Among the cases cited by *Crossman* as illustrative of the proper application of the definition of “property damage” is *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005) (“In the present case, the complaint did not allege property damage beyond the improper performance of the task itself.”). *Crossman*, 395 S.C. at 49, 717 S.E.2d at 593.

As expressed in *L-J*, “a CGL policy is not intended to cover economic loss resulting from faulty workmanship.” 366 S.C. at 122, 621 S.E.2d 33 at 36, *citing, Century Indem. Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 563-64, 561 S.E.2d 355, 357 (2002). The *L-J* court reasoned that “any liability that is incurred because of faulty workmanship is part of the insured’s contractual liability, not an insurable event under a CGL policy.” *Id.* (citations omitted). Therefore, the court held that a commercial general liability insurance policy “will not stand to cover liability for the Contractor’s contract liability for a claim that was for money damages to compensate for the defective work.” 348 S.C. at 124, 561 S.E.2d at 36-37. To hold otherwise, said the court, would transform the CGL policy into a performance bond, which guarantees the work, rather than an insurance policy, which is intended to insure against accidents. *Id.* “Consequently,” the

court said, "our holding today ensures that ultimate liability falls to the one who performed the negligent work – the subcontractor – instead of the insurance carrier." *Id.*

C.D. Walters Construction Co. v. Fireman's Insurance Company of Newark, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) provides a cogent explanation of the difference between "business risks" assumed by a contractor in the ordinary, normal course of business and "insurable risks" assumed by the contractor's insurance company under a commercial general liability insurance policy:

"The insured, as a source of goods or services, may be liable as a matter of contract law to make good on products or work which is defective or otherwise unsuitable because it is lacking in some capacity. This may even extend to an obligation to completely replace or rebuild the deficient product or work. This liability, however, is not what the coverages in question are designed to protect against. The coverage is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained."

281 S.C. at 596, 316 S.E.2d at 712, *quoting with approval, Weedo v. Stone-E-Brick, Inc.*, 81 N.J. 233, 405 A.2d 788, 791 (1979).

The distinction recognized in *Crossman, L-J*, and *C.D. Walters* is reflected in the Policy definition of "property damage," as construed by *Walde* and other courts that have applied the same or similar definition of "property damage" to claims like that of *Precision Walls*. The cases discussed below are illustrative.

New Hampshire Ins. Co. v. Vieira, 930 F.2d 696, 699 (9th Cir. 1991) is a good example. In *Vieira*, a drywall subcontractor sought coverage under a CGL policy for the costs of retro-fitting three buildings with drywall in the attic, which had been specified by the general contractor for the original construction, but omitted by the subcontractor. The

subcontractor argued, in part, that the costs of correcting the defect constituted “property damage” because the remedial work required holes to be cut in the roofs of the buildings in order to install the drywall. Rejecting this contention, the court held “the nature of repairs cannot create coverage where none exists.” *Id.* Having already found that loss measured by diminution in value of the buildings because of the defect was not “property damage,” the court observed that, “[d]iminution in value and cost of repair are not two separate harms – they are two different ways of measuring the same harm.” *Id.* “If the harm - Vieira’s defective work is not covered as measured by diminished value, it is not covered as measured by the cost of repair,” the court said. *Id.* at 701-02.

South Carolina follows the same logic and reasoning as *Vieira*. See, *Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003)(“Most courts hold the diminished value of tangible property does not constitute property damage within the meaning of CGL policies which define property damage as physical injury”). Further, in South Carolina, as in *Vieira*, diminution in value and cost of repair are simply different ways of measuring the same harm. See, *Scott v. Fort Roofing and Sheet Metal Works, Inc.*, 299 S.C. 449, 385 S.E.2d 826 (1989) (recognizing cost of repair as an alternative to diminution in value as a measure of damage to property).

Similarly, in *Traveler's Ins. Co. v. Eljer Manufacturing, Inc.*, 197 Ill.2d 278, 757 N.E.2d 481 (2001), the Illinois Supreme Court held that economic loss resulting from a building owner’s deliberate decision to remove and replace a defective polybutylene plumbing system was not “property damage” and, therefore, not covered under a commercial general liability policy that defined “property damage” as “physical injury to

tangible property.” 757 N.E.2d at 494-504. The court rejected the building owners’ arguments that damage to the walls, or floors, or ceilings caused by the removal of the plumbing system were covered “property damage.” *Id.* at 504. The court said “[t]he ‘injury’ caused by the Qest system under these facts flows from the claimant’s disappointed commercial expectations in the performance of the Qest system and is not an injury which is ‘physical’ in nature.” *Id.* (emphasis in original). Furthermore, “[c]onsistent with the policy language agreed upon by the parties to the insurance contract, the insurers did not consent to become guarantors of the product quality or the performance of the Qest systems,” the court said. *Id.* It declined to interpret the liability policy to find coverage for the cost of repairing or replacing defective work, which would have the effect of transforming the liability policy into something like a performance bond. *Id.* at 503.

Other courts around the country have followed the same principles to preclude coverage under commercial general liability policies for economic losses resulting from the repair or replacement of defective work or products that have not caused “physical injury to tangible property” aside from the repair work itself. *E.g., Jacob v. Russo Builders*, 224 Wis.2d 436, 450, 592 N.W.2d 271, 277 (1999) (Damages to driveway, sidewalk, patio, and landscaping resulting from the need to get access for repair and replacement of defective masonry were not “property damage” that resulted from insured’s defective work, but were the result of repair efforts by others, and, therefore, not covered by subcontractor’s commercial general liability policy); *Fireman’s Ins. Co. of Newark v. National Union Fire Ins. Co.*, 387 N.J. Super. 434, 904 A.2d 754 (A.D.

2006) (Damages caused by removal and replacement of substandard firewalls were not covered "property damage" under commercial general liability policy).

According to *Crossman and Walde*, the losses claimed by Precision Walls are not covered "property damage," because they do not constitute an "injury." Furthermore, like *Eljer, supra*, if there was an injury, it was not "physical in nature" but the result of disappointed commercial expectations stemming from the inadequate performance of the insulation tape. The demolition of the brick veneer was purely incidental to the repair of a non-covered economic loss (i.e. the joint tape) and as such is not within the coverage of the Policy. The trial court correctly construed the Policy language according to the plain, ordinary, and popular meaning, and in doing so, was true to the fundamental principles of South Carolina law governing coverage under CGL policies.

III. The trial court correctly found that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage," such damage did not result from an "occurrence" as defined in the insurance policy.

The insuring agreement covers "property damage" only if it is caused by an "occurrence." According to the Policy Definitions, the term "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions." (Policy, Section V – Definitions, part 13, R. p. 234). The term "accident" is not defined in the Policy. In the context of a CGL policy, the South Carolina Supreme Court defines "accident" as "an unexpected happening or event, which occurs by chance and usually suddenly, with harmful result, not intended or designed by the person suffering the harm or hurt." *E.g. Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 192, 684 S.E.2d 541, 543 (2009).

In *L-J*, *supra*, the South Carolina Supreme Court, following the majority rule, held that faulty work is not an "occurrence" where the claim is for money damages to compensate for repairing the defective work. 366 S.C. at 124, 621 S.E.2d at 36. As explained above, Precision Walls' claim for the costs incurred for the removal and replacement of the otherwise intact brick veneer was for the correction of its own defective work, and, therefore, not an "occurrence." The brick veneer was not damaged by the loss of adhesion of the seal tape on the insulation board. It was torn down deliberately at the direction of the owner and general contractor as part of the plan to remove and replace the faulty insulation tape. The removal of the veneer was neither unexpected nor by chance. It was intentional, by the design of the building owner and general contractor.

The recent decision of the South Carolina Supreme Court in *Crossman*, *supra* does not change the conclusion drawn from *L-J*. Unlike the present case, the claim at issue in *Crossman* was for progressive damages to other property caused by water intrusion through the improperly installed exterior siding. The court was construing the part of the definition of "occurrence" concerning "continuous or repeated exposure to substantially the same general harmful conditions." By contrast, here there is no allegation of progressive property damage. The question is simply whether the deliberate decision to remove the brick veneer was an "accident," which it plainly was not. See, *Bright Wood Corp. v. Bankers Standard Ins. Co.*, 665 N.W.2d 544 (Minn. Ct. App. 2003)(damage to other property resulting from deliberate actions undertaken in the course of repairing deficient product is not an "occurrence").

This court need not reach the issue of whether or not the losses claimed by Precision Walls resulted from an "occurrence" because it has already been shown that the losses were not "property damage." Even so, the undisputed facts show the losses also were not accidental and, therefore, were not the result of an "occurrence" as defined in the Policy.

IV. The trial court correctly found that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant's work underneath were "property damage" resulting from an "occurrence," such damage is excluded from coverage by Exclusion "j(6)".

As an alternative basis for denial of coverage, Liberty Mutual established in the trial court that even if the losses claimed by Precision Walls were found to be within the coverage of the insuring agreement, the losses would be excluded by Exclusion "j(6)". (Policy, Section 1 – Coverages – part 2. Exclusions. – subpart j(6); R. p. 224-25). In pertinent part, it excludes coverage for "property damage" to "[t]hat particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it." (*Id.*)

The term "your work" is defined as follows:

22. "Your Work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1) Warranties or representations made at any time with respect to the fitness, quality, durability, performance or use of "your work", and

- (2) The providing of or failure to provide warnings or instructions.

(Policy, Section V – Definitions, part 22, R. p. 236).

An exclusion virtually identical to this one was applied by the South Carolina Supreme Court in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), *overruled on other grounds*, *Crossman Communities of N.C., Inc. v. Harleysville Mut. Ins. Co.*, 717 S.E.2d 589 (2011)(trigger of coverage). In *Century Indemnity*, a homeowner sought coverage under a contractor's commercial general liability policy for property damage to the wall sheathing and substrate of their home caused by water intrusion through an exterior stucco cladding that was improperly installed. Rejecting the homeowners' argument that the exclusion applied only to the defective work (i.e., the stucco cladding) and not the damage to the underlying substrate, the court held: "Based on the law of this State, coverage for the repair and/or replacement of the substrate and substructure of the home is excluded by the faulty workmanship provision." (citations omitted). 348 S.C. at 566, 561 S.E.2d at 359. As supporting precedent, the court referenced a number of cases from South Carolina and other states that had applied a similar exclusion in analogous factual circumstances, including *Engineered Prods, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 368 S.E.2d 674 (Ct. App. 1988)(coverage excluded for damages resulting from restoration, repair, or replacement of rack system where losses were the result of subcontractor's failure to properly install anchor system); and *C.D. Walters Constr. Co., Inc. v. Fireman's Ins. Co. of Newark, New Jersey*, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) (coverage excluded for property damages resulting from faulty workmanship).

Walde, supra, also held that an exclusion virtually identical to (j)(6) “excluded coverage not only for (1) ‘property damage’ to defective work caused by that defective work but also (2) ‘property damage’ to non-defective work caused by the defective work.” *Walde*, 401 S.C. at 447, 737 S.E.2d at 639, *quoting*, *Century Indemnity*, 348 S.C. at 565-67, 561 S.E.2d at 358-59. Furthermore, the continuing vitality of *Century Indemnity* on this point was recently re-affirmed by the South Carolina Supreme Court in *Bennett & Bennett Constr., Inc. v. Auto Owners Ins. Co.*, 2013 S.C. Lexis 170 (July 17, 2013), *rehearing denied*, 2013 S.C. Lexis 234 (September 6, 2013), *quoting with approval*, *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 566, 561 S.E.2d 355, 358 (2002), *overruled in part on other grounds by Crossman Communities of North Carolina, Inc. v. Harleysville Mut. Ins. Co., supra*.

All of these cases follow the consistent theme that commercial general liability policies do not cover contractual liabilities for economic losses resulting from deficient work of the insured, which, according to the Policy definition of “Your Work,” includes “[m]aterials, parts or equipment furnished in connection with such work or operations” and “[w]arranties or representations made at any time with respect to the fitness, quality, durability, performance or use of ‘your work’.” The losses for which Precision Walls seeks reimbursement from Liberty Mutual are a classic example of the type of business risk that is the contractual responsibility of Precision Walls, not its liability insurer.

- V. The judgment of the trial court should be affirmed under Rules 208(b)(2) and 220(c) SCACR because the Record on Appeal shows that even if subcontract deductions made by the general contractor for the costs of removal and replacement of brick veneer in order to remedy a deficiency in Appellant’s work underneath were “property damage” resulting from an “occurrence,” such damage is excluded from coverage by Exclusion “m”.

As an alternative basis for judgment, Liberty Mutual presented evidence and argument in the trial court to show that even if the losses claimed by Precision Walls for the removal and replacement of brick veneer were determined to be "property damage" within the Policy definition, coverage for such losses would be excluded by Exclusion "m." Although the trial court did not reach the issue, the Record on Appeal shows that Liberty Mutual is entitled to judgment on those grounds as well, and this Court should affirm the judgment pursuant to Rules 208(b)(2) and 220(c), SCACR. *See, I'On, LLC v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 23 (2000)(under present rules, appellate court may affirm lower court's ruling on any ground appearing in the record on appeal regardless of whether the issue was ruled upon by trial court).

According to Exclusion "m," coverage is excluded for:

"Property damage" to "impaired property" or property that has not been physically injured, arising out of:

- (1) A defect, deficiency or dangerous condition in "your product" or "your work"; or
- (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms.

This exclusion does not apply to the loss of use of other property arising out of sudden and accidental physical injury to "your product" or your work after it has been put to its intended use."

(Policy, Section I – Coverages, part 2 – Exclusions - subpart "m", R. p. 225)

The term "impaired property" is defined as follows:

"8. Impaired property" means tangible property, other than "your product" or "your work" that cannot be used or is less useful because:

a. It incorporates "your product" or "your work" that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of "your product" or "your work" or your fulfilling the terms of the contract or agreement."

(Policy, Section V – Definitions – part 8, R. p. 233).

Even if the losses claimed by Precision Walls were determined to be within the coverage of the insuring agreement, they would nonetheless be excluded by Exclusion m. Precision Walls contends that the usefulness of the wall clad with the brick veneer was "impaired" because it incorporated defective work not in compliance with the terms of Precision Walls' subcontract. Furthermore, Precision Walls contends the "impaired property" was restored by the repair and replacement of the defective work or product of Precision Walls, which could only be effected by removal of the brick veneer siding. The "impaired property" exclusion would apply to the costs of repair and replacement of the defective work and any loss of use. *See, St. Paul Fire and Marine Ins. Co. v. Futura Coatings, Inc.*, 993 F.Supp. 1258 (D. Minn. 1998) ("impaired property" and "business risk" exclusions applied to preclude coverage for losses caused by the failure of sealant manufacturer's products to perform as promised).

CONCLUSION

The trial court was correct in its determination that the costs of removal and replacement of brick veneer as part of remedial work directed by the property owner and general contractor to correct a deficiency in insulation joint tape supplied and installed by

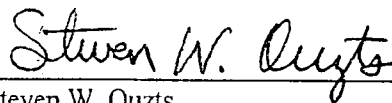
Precision Walls were not "physical injury to tangible property," and, therefore, were not covered by the Policy. Further, the trial court was correct in finding that the losses claimed by Precision Walls were not the result of an "occurrence" as defined by the Policy. On those grounds, the order of the trial court should be affirmed.

In addition, the trial court correctly determined that even if the losses claimed by Precision Walls were found to meet the definition of "property damage" resulting from an "occurrence," coverage would be excluded by Exclusion "j(6)". The order should be affirmed on that ground as well. Finally, the Record on Appeal shows that Exclusion "m" would exclude coverage, and the order should be affirmed on that additional ground pursuant to Rules 208(b)(2) and 220(c), SCACR.

Respectfully submitted,

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November 20, 2013



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Company Respondent.

CERTIFICATE OF COUNSEL

The undersigned counsel hereby certifies that this Final Brief complies with Rule
211(b), SCACR.

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ARGUMENT

- I. **Liberty Mutual's arguments against coverage are premised upon misconceptions regarding the scope of coverage under Commercial General Liability policies.**

Throughout its brief, Liberty Mutual intersperses misleading dicta from insurance coverage cases that Commercial General Liability ("CGL") insurance policies, such as the one issued to Precision Walls by Liberty Mutual, only cover tort liability of the insured. Liberty Mutual then follows this with the argument that to construe CGL policies otherwise would, in effect, convert them into performance bonds. For the reasons explained below, neither of these propositions is accurate and they only serve to distract courts from engaging in a proper analysis of the scope of coverage under CGL policies.

- A. **The CGL Policy covers more than just tort claims.**

One need only read the opening language of the insuring agreement of a standard CGL policy to understand that the scope of coverage of the policy is not dependent upon any distinction between tort or contract liability of the insured. The relevant language is as follows:

SECTION I – COVERAGES

COVERAGES A BODILY INJURY AND PROPERTY DAMAGE LIABILITY

1. **Insuring Agreement**

- a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. . . .

(Liberty Mutual Ex. 1, Section I—Coverages; R. p. 169)

Precision Walls acknowledges that South Carolina's appellate courts have, in dicta, made the statement that CGL policies are intended to cover tort liability of the insured rather than contractual liability for economic loss. See e.g. *L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 122, 621 S.E.2d 33, 36 (2005). The problem with this statement is that it has caused courts to stray from a straightforward analysis of the terms of the CGL policy's insuring agreement and focus instead on the legal nature of the insured's liability (i.e. tort versus contract). It is ironic that some courts have latched on to this distinction considering the fact that the term "tort" does not even appear in the standard CGL policy. See *American Family Mut. Ins. Co. v. American Girl, Inc.*, 673 N.W.2d 65, 76-78 (Wis. 2004). Moreover, the plain language of the insuring agreement makes it clear that the insurer will pay those sums that the insured becomes **legally obligated** to pay without any distinction as to whether the liability arises in tort or contract.

The genesis for the current misperception of the CGL policy's scope of coverage is a 1971 law review article written by Dean Roger Henderson regarding insurance coverage under a version of a standard CGL policy which has long been outdated. See *Insurance Protection for Products Liability and Completed Operations: What Every Lawyer Should Know*, 50 Neb. L.Rev. 415 (1971). In this article, Dean Henderson wrote that "[t]he coverage [under a CGL policy] is for tort liability for physical damages to others and not for contractual liability of the insured for economic loss because the product or completed work is not that for which the damaged person bargained." *Id.* at 441. This quote from Dean Henderson's law review article has been misconstrued and misapplied many times over the years likely

starting with the New Jersey Supreme Court's opinion in *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979). It is important to note several things about the *Weedo* case since insurance carriers continue to rely upon and cite this case in coverage disputes as Liberty Mutual has done in its brief.¹ First, the *Weedo* court was construing the scope of coverage under the terms of the 1966 version of the standard CGL policy which have been substantially and materially revised since that time. See *Weedo*, 405 A.2d at 790 n. 1; see also *American Girl, Inc.*, 673 N.W.2d at 76-78 (discussing *Weedo* and its interpretation of pre-1986 CGL policy terms). Second, the *Weedo* court never discussed the insuring agreement's initial grant of coverage; instead, the court decided the coverage issue on the basis of the policy's exclusions. See *American Girl, Inc.*, 673 N.W.2d at 76-78, discussing *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788 (N.J. 1979). In fact, the *Weedo* court stated that "but for the exclusions in the policy, coverage would obtain. . . ." *American Girl, Inc.*, 673 N.W.2d at 76-78, quoting *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 790 n. 2 (N.J. 1979). Therefore, as the Supreme Court of Wisconsin astutely noted in *American Girl*, "*Weedo* does not hold that losses actionable as breaches of contract cannot be [covered under post-1986 CGL policies]." *American Girl, Inc.*, 673 N.W.2d at 76-77.

An examination of a recent South Carolina case on the scope of coverage for CGL policies demonstrates that our courts have recognized that the legal nature of the

¹ Liberty Mutual cites the opinion of the South Carolina Court of Appeals in *C.D. Walters Constr. Co. v. Fireman's Ins. Co. of Newark*, 281 S.C. 593, 316 S.E.2d 709 (Ct. App. 1984) ostensibly for a "cogent explanation" of the difference between "business risks" and "insurable risks." See Brief of Respondent at p. 14. However, the quote set forth in Liberty Mutual's brief from the *C.D. Walters* opinion is taken directly from the *Weedo* opinion where the *Weedo* court is quoting directly from Dean Henderson's law review article. See *American Girl, Inc.*, 673 N.W.2d 65, 76-78. Moreover, *C.D. Walters* also involved the interpretation of a pre-1986 CGL policy rendering it outdated and inapplicable to the analysis of post-1986 CGL policies. See *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 195, 684 S.E.2d 541, 545 n. 2 (2009) (noting that *C.D. Walters* was distinguishable from instant case because it was analyzing pre-1986 CGL policy).

claim against the insured is not determinative of whether coverage exists under the insuring agreement. In *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009), our state Supreme Court affirmed the trial court's finding that the homebuilder's CGL policy covered the claims asserted against a homebuilder by the homeowner. The homeowner sought damages for defective construction involving the home's stucco siding based upon claims for breach of contract, breach of warranty, and negligence against the homebuilder. *Id.* The *Newman* court correctly analyzed coverage under the insuring agreement of the CGL policy without regard to whether the insured's liability to the homeowner was based in tort or contract. Moreover, the *Newman* court also recognized that the 1986 amendments to standard CGL policies provide for a broad grant of coverage under the insuring agreement which is then reduced through certain policy exclusions relating to the insured's own work product. See *Newman*, 385 S.C. at 195-196, 684 S.E.2d at 545; see also *American Girl, Inc.*, 673 N.W.2d at 74 ("[t]he CGL insuring agreement is a broad statement of coverage, and insurers limit their exposure to risk through a series of specific exclusions."). The CGL policy's exclusions are where the insured's own work product becomes an issue, not in the initial grant of coverage under the insuring agreement.

As set forth above, the sun has set on Dean Henderson's tort versus contract distinction as perpetuated by *Weedo* and its progeny. The CGL policy insuring agreement makes no such distinction and it simply does not exist. Accordingly, in this instance, the fact that Precision Walls' loss arises out of its contractual liability to

its general contractor, SYS Constructors, is simply not relevant as it relates to whether coverage exists under the CGL policy's insuring agreement.

B. Finding that the insuring agreement can cover contract claims as well as tort claims will not turn the standard CGL policy into a performance bond.

Just as with the tort versus contract distinction for covered losses under a CGL policy, courts have made comments in coverage cases to the effect that covering claims arising out of the insured's contractual liability would act to transform the CGL policy into a performance bond. *See e.g. L-J, Inc. v. Bituminous Fire and Marine Ins. Co.*, 366 S.C. 117, 621 S.E.2d 33 (2005). It is unfortunate that some courts have latched on to this argument because it is misleading and untrue.

In order to understand the fallacy in comparing CGL policies to performance bonds, it is instructive to examine the nature and purpose of a performance bond which is simply a type of surety bond. The South Carolina Supreme Court provided an excellent description of the nature of a performance bond in the case of *Masterclean, Inc. v. Star Ins. Co.*, 347 S.C. 405, 556 S.E.2d 371 (2001). The *Masterclean* court described the performance bond as follows:

A surety bond, unlike insurance, is used to obtain a commercial advantage. 'The principal does not seek protection from the surety against calamity ... the principal seeks the commercial advantage of obtaining a contract with the obligee, which requires a performance or payment bond.' The state [South Carolina] requires performance bonds for public construction contracts to protect itself from a principal's breach. The principal obtains the bond merely for the economic advantage of competing for the contract. There is no objective economic reason why a principal would voluntarily choose to provide a bond since it still bears the burden of performing and indemnifying the surety for any default.

Masterclean, Inc., 347 S.C. at 413, 556 S.E.2d at 376 (internal citations omitted).

Thus, unlike a CGL insurance policy, a performance bond is designed to protect the obligee not the principal. *See id.* Under a performance bond, it is the principal who owes the surety a duty to indemnify the surety for any payments made or losses incurred by the surety on the payment bond.

With this background in mind, there is simply no way that finding that coverage for certain losses arising from an insured's contractual obligations change the status of the CGL insurer to that of a surety on a performance bond. Under the CGL policy, it is the insurer that owes the insured a duty of indemnity for covered losses. Conversely, on a performance bond, it is the principal who owes a duty of indemnity to the surety. In fact, the very foundation of this relationship is based upon the concept that the surety will never be made to ultimately pay for the default of its principal as it will be indemnified in full by the principal for the discharge of its obligations on the bond. Moreover, as set forth in *Masterclean, supra*, the performance bond is primarily for the benefit of the obligee on the bond rather than the principal while a CGL policy is primarily for the benefit of protecting the insured against certain defined risks. So when courts loosely analogize coverage for losses arising out of an insured's contractual liability under CGL policies to performance bonds, they are erroneously focusing on the perceived benefit that an insured would receive by being treated like a principal on a performance bond. Yet, as discussed above, there is no benefit to being the principal on a performance bond in a default situation. To the contrary, there is only an obligation to indemnify the surety for its

discharge of its obligations under the performance bond which cannot be reasonably compared to the status of an insured on a claim covered by its CGL policy.

By examining the duties and obligations of the principal and surety under performance bonds, it is clear that they are so fundamentally different than those of the insured and insurer under a CGL policy that there can be no comparison between a performance bond and a CGL policy. To attempt to compare them only detracts from a proper coverage analysis which should be focused on applying the underlying facts to the terms of the CGL policy's insuring agreement and exclusions.

II. Liberty Mutual erroneously relies on cases dealing with diminution in value claims, CGL policy exclusions, and outdated versions of CGL policies in support of its argument that the facts of this case do not establish "property damage" under the insuring agreement.

In support of its argument that Precision Walls' claim is not for "property damage," Liberty Mutual engages in an extensive discussion of cases from various jurisdictions dealing with whether diminution in value of property alone, without any accompanying physical injury, constitutes property damage. *See* Brief of Respondent at pp. 14-16, *citing Auto-Owners Ins. Co. v. Carl Brazell Builders, Inc.*, 356 S.C. 156, 588 S.E.2d 112 (2003); *New Hampshire Ins. Co. v. Vieira*, 930 F.2d 696 (9th Cir. 1991); *Travelers Ins. Co. v. Eljer Manufacturing, Inc.*, 757 N.E.2d 481 (Ill. 2001). While these cases decided that diminution in property value without accompanying physical injury did not constitute property damage under the applicable CGL policy, that analysis is irrelevant and of no help to the Court in this instance. Precision Walls' claim is not based on diminution in value of the property. The claim is for third party property damage for which Precision Walls' was legally obligated to pay.

Liberty Mutual further erroneously relies upon a case dealing with CGL policy exclusions in support of its argument that the facts of this case did not establish “property damage” under the CGL policy’s insuring agreement. Unfortunately, insurers have caused much confusion over the years, especially in coverage cases litigated in the appellate courts of this State, by advancing arguments that involve moving concepts set forth in the CGL policy exclusions to the analysis of terms such as “occurrence” and “property damage” located in the insuring agreement of the CGL policy. See e.g. *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009); *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011). So it is here as Liberty Mutual relies upon the case of *Jacob v. Russo Builders*, 592 N.W.2d 271 (Wis. 1999) in support of its argument that there is no “property damage” under the CGL’s policy’s insuring agreement. See Brief of Respondent at pp. 16-17. However, that case involved the application of certain policy exclusions to defeat coverage for certain parts of the insured’s claim. See *Jacob v. Russo Builders*, 592 N.W. 2d 271. In order to get to policy exclusions, there must first be a finding that the insured’s claim invokes coverage under the CGL policy’s insuring agreement. Therefore, this case is simply inapplicable and of no value in analyzing whether the facts of this case establish “property damage” under the insuring agreement.

Lastly, Liberty Mutual cites the case of *Fireman’s Ins. Co. of Newark v. National Union Fire Ins. Co.*, 904 A.2d 754 (N.J. Super. Ct. App. Div. 2006) for the proposition that repair or replacement of defective work that has not caused “physical injury to tangible property” aside from the repair work itself is not covered under the

standard CGL policy. See Brief of Respondent at pp. 16-17. However, this case is inapplicable in several key respects. First, all of the CGL policies at issue were the 1973 version of the standard CGL policy issued by the Insurance Services Office which has long been outdated. See *Fireman's Ins. Co. of Newark*, 904 A.2d at 757. Second, the court relied heavily on the outdated analysis of *Weedo v. Stone-E-Brick, Inc.*, 405 A.2d 788, 790 n. 2 (N.J. 1979), in support of its holding.² See *id.* at 758. Lastly, as opposed to the claim of Precision Walls which involves third-party property damage to non-defective work, the *Fireman's* court found that the claim in that matter did not involve damage to property other than to the defective work itself. See *id.* at 760. Therefore, as it relates to the coverage analysis in this case, there is no value in a New Jersey case applying a coverage analysis to pre-1986 CGL policies based upon materially different facts.

III. The South Carolina Supreme Court's recent opinion in *Auto-Owners v. Rhodes* conclusively establishes that the facts presented in this case constitute an "occurrence" under the CGL policy insuring agreement.

Liberty Mutual attempts to distinguish the South Carolina Supreme Court's holding in *Crossman Communities of North Carolina, Inc. v. Harleysville Mutual Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), regarding the definition of the policy term "occurrence" on the basis that *Crossman* involved a claim for progressive property damage while Precision Walls' claim is not one for progressive property damage. While such a distinction is strained at best, it is of no moment after the recent opinion from the South Carolina Supreme Court in *Auto-Owners Ins. Co. v. Rhodes*, Opinion No. 27316 (S.C. Sup. Ct. filed September 25, 2013). In *Rhodes*, the court was "confronted with the question of whether *Crossman's* expansive view of an

² See pp. 2-3, *supra*.

'occurrence' is limited to progressive property damage cases." *Id.* The plaintiff in *Rhodes* was an individual who owned several large outdoor advertising signs on his property in Fairfield County adjacent to Interstate 77. *Id.* The defendants were the company that designed and constructed the signs as well as the principal owner of the company who were insured under a CGL policy by Auto-Owners. *Id.* One of the signs fell across Interstate 77 blocking traffic. *Id.* As a result of this, the South Carolina Department of Transportation ("SCDOT") ordered Rhodes to take down the remaining two signs. *Id.* After considering the implications of *Crossman*, the *Rhodes* court found that the fallen sign constituted an "occurrence" that triggered coverage under the CGL policy even as to the remaining two signs. *Id.* In so finding, the court applied a "but for" causal analysis reasoning that were it not for the first sign falling, there would have been no SCDOT mandate to remove the remaining two signs. *Id.* Therefore, the *Rhodes* court extended the application of *Crossman* to the "occurrence" analysis in situations such as the one in this case which do not involve the traditional progressive property damage found in most construction defect cases.

Applying this same analysis to the facts of this case, there can be no doubt that there is an "occurrence." "But for" the defective tape losing its adhesion and coming loose at the insulation board joints, there would have been no need to tear down the brick veneer wall. Therefore, after the recent opinion in *Rhodes*, it is clear that the trial court's ruling as to the issue of whether there is an "occurrence" must be reversed.

IV. Liberty Mutual avoids addressing the plain language of policy Exclusion "j(6)" because it clearly renders this policy exclusion inapplicable under the facts of this case.

In support of its argument as to why Exclusion "j(6)" applies, Liberty Mutual offers no resistance to Precision Walls' argument that Exclusion "j(6)" cannot apply here because it requires that Precision Wall's defective work must have been performed on the property that must be repaired or restored. That means that Precision Wall's defective work (i.e. the defective joint tape) had to have been performed on the damaged property (i.e. the brick veneer wall) in order for Exclusion "j(6)" to apply. As the facts here clearly demonstrate, that was not the case as the brick veneer wall was constructed by the masonry subcontract **after** Precision Walls had taped the insulation joints. While Liberty Mutual is free to ignore this argument, this Court cannot ignore this critical requirement of Exclusion "j(6)." The trial judge erred in finding that this exclusion applied and the plain facts of this case require reversal on this ruling.

V. Exclusion "m" does not apply because the brick veneer wall does not meet the policy definition of "impaired property."

Despite not seeking a ruling on the application of Exclusion "m" to the facts of this case by way of post-trial motion, Liberty Mutual now argues as an additional sustaining ground that this policy exclusion applies to bar coverage. To the extent that this issue has been preserved for review, the facts of this case demonstrate that there is no "impaired property" rendering the exclusion inapplicable. In reviewing the application of policy exclusions, courts are bound by the fundamental principles that "[p]olicies are construed in favor of coverage, and exclusions in an insurance

policy are construed against the insurer.” *M & M Corp. of S. Carolina v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010).

Exclusion “m” to the CGL policy at issue here, commonly known as the “impaired property exclusion,” applies only to “property damage” to “impaired property.” (Liberty Mutual Ex. 1 Section I—Coverages, part 2—Exclusions-subpart m; R. p. 225) The key analysis as to this exclusion is whether the brick veneer wall meets the policy definition of “impaired property.” It does not. The policy defines “impaired property” as follows:

8. “Impaired Property” means tangible property, other than “your product” or “your work” that cannot be used or is less useful because:

a. It incorporates “your product” or “your work” that is known or thought to be defective, deficient, inadequate or dangerous; or

b. You have failed to fulfill the terms of a contract or agreement;

if such property can be restored to use by the repair, replacement, adjustment or removal of “your product” or “your work” or your fulfilling the terms of the contract or agreement.

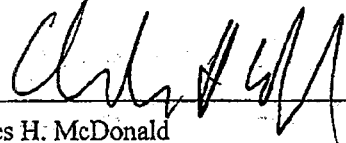
(Liberty Mutual Ex. 1 Section V—Definitions-part 8 (emphasis added); R. p. 233)

The relevant inquiry becomes whether the brick veneer wall could be restored to use by the repair of the defective tape. If so, then it could be “impaired property.” If not, then it cannot be “impaired property.” Clearly, the brick veneer wall could not be restored to use by Precision Walls’ removing and re-applying the joint sealing tape. It had to be rebuilt after such work was done by Precision Walls. Accordingly, there is no “impaired property” under the facts of this case and this exclusion does not apply.

In its argument, Liberty Mutual erroneously states that Precision Walls contends that the usefulness of the brick veneer wall was impaired because it incorporated defective work not in compliance with Precision Walls' subcontract requirements. See Brief of Respondent at p. 23. Precision Walls has made no such claim with respect to the brick veneer wall. As far as Precision Walls' knew, the brick veneer wall was perfectly fine. Moreover, Precision Walls never contended that the brick veneer wall incorporated its work. For reasons that cannot be adequately explained, Liberty Mutual incorrectly thought that the Seam and Seal tape was part of the brick veneer wall. But that was Liberty Mutual's own misunderstanding, not a claim made by Precision Walls.

In similar fashion, Liberty Mutual erroneously claims that Precision Walls contends that the brick veneer wall was restored by the repair of the defective tape. See Brief of Respondent at p. 23. Precision Walls has made no such claim. To the contrary, Precision Walls has always maintained the obvious--that the brick veneer wall could not be restored by the removal and replacement of the tape at the insulation board joints. Because the brick veneer wall had to be torn down in order for Precision Walls to access the insulation board joints, it obviously could not be restored to use just by replacing the defective joint tape. Instead, it had to be rebuilt once Precision Walls replaced the defective joint tape.

Respectfully Submitted,



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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

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SC Court of Appeals

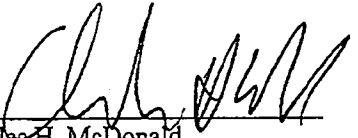
Precision Walls, Inc. Appellant,

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Liberty Mutual Fire Insurance Co. Respondent.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that this Final Reply Brief complies with
Rule 211(b), SCACR.


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November 26, 2013

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Precision Walls, Inc., Appellant,

v.

Liberty Mutual Fire Insurance Co., Respondent.

Appellate Case No. 2013-000787

Appeal From Greenville County
Letitia H. Verdin, Circuit Court Judge

Opinion No. 5250
Heard May 13, 2014 – Filed July 23, 2014

AFFIRMED

Charles H. McDonald, of Robinson, McFadden &
Moore, P.C., of Columbia, for Appellant.

Steven W. Ouzts, of Turner, Padget, Graham, & Laney,
P.A., of Columbia, for Respondent.

SHORT, J.: In this declaratory judgment action seeking a determination of coverage under an insurance policy, Precision Walls, Inc. (Precision) appeals the trial court's order, which found no coverage and granted judgment in favor of Liberty Mutual Fire Insurance Co. (Liberty Mutual). Precision argues the court erred in: (1) declining to find "property damage" under the policy; (2) declining to find an "occurrence" under the policy; (3) broadly construing one of the policy's

exclusions to defeat coverage; and (4) narrowly construing the policy against coverage. We affirm.

I. FACTS

Precision worked on a building project in Easley, South Carolina, as a subcontractor to the general contractor, SYS Constructors, Inc. (SYS). The contract between SYS and Precision provided the following description of the scope of work:

Scope of work includes all material, labor, equipment[,] and supervision of the following: all light guage (sic) metal framing of walls, roof trusses and decking, building insulation, densglass on exterior, taped & sealed blue board insulation on exterior, [and] installation of door frames. . . . Exterior insulation to be sealed so as to prevent air infiltration.

The contract also provided the following warranty:

The Subcontractor expressly warrants that all materials, work[,] and equipment incorporated in the Work shall conform to the specifications, drawings, samples[,] and other descriptions set forth in the Subcontract and the Contract Documents and will be of good materials and workmanship and free from defect and warrants that all materials and equipment are both merchantable and fit for the purposes for which they are intended to be used under the Contract Documents. . . . Upon receipt of written notice from Contractor or Owner of any breach of warranty during the applicable warranty period, Subcontractor shall correct the affected work and all costs incurred as the result of breach of warranty shall be borne by Subcontractor. Should Subcontractor fail to make the necessary correction promptly, Contractor may perform or cause to be performed the necessary work at Subcontractor's expense.

Precision used Seam & Seal tape manufactured by Berry Plastics to tape and seal the joints of the blue board insulation on the building. After Precision installed the insulation, Pride Masonry began constructing a brick veneer exterior wall. Prior to the completion of the brick wall, SYS observed the tape used to seal the joints was losing adhesion and coming loose.

After numerous emails and meetings, on February 12, 2010, SYS directed Precision by letter to comply with its contract to provide sealed joints. SYS required the masonry subcontractor to remove the portion of the brick wall then in place and build a new one once Precision removed the existing tape and sealed the joints with new tape. By change order, SYS deducted \$97,500, the cost of tearing down and rebuilding the brick veneer, from Precision's contract.

Precision was covered under a commercial general liability (CGL) policy issued by Liberty Mutual (the Policy). The insuring provision of the Policy provided coverage for "those sums that the insured becomes legally obligated to pay as damages because of . . . 'property damage' to which this insurance applies." The Policy defined "property damage" as "[p]hysical injury to tangible property, including all resulting loss of use of that property." The Policy applied to "'property damage' only if . . . [t]he . . . 'property damage' is caused by an 'occurrence . . .'" The Policy defined "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions." Finally, the Policy provided an exclusion for "property damage" to "any property that must be restored, repaired[,] or replaced because 'your work' was incorrectly performed on it." The term "your work" was defined in the Policy as follows:

22. "Your Work":

a. Means:

- (1) Work or operations performed by you or on your behalf; and
- (2) Materials, parts[,] or equipment furnished in connection with such work or operations.

Precision sought coverage under the Policy, which Liberty Mutual denied. Precision filed this declaratory judgment action.

The trial court found the only loss claimed by Precision was the liability it incurred when SYS tore down and reconstructed the otherwise undamaged brick veneer wall for the remedial purpose of bringing Precision's own work into compliance with its contract with SYS. The court found the loss claimed by Precision was not "property damage" as defined by the Policy. The trial court also found the loss resulted from Precision's nonconforming work, and the costs of faulty workmanship and repairing defective work were not an "occurrence" under the Policy. Finally, the court found "[e]ven if the losses . . . were found to be within" the Policy, they were excluded under the "your work" exclusion. Thus, the court found the Policy provided no coverage for Precision's claim. This appeal followed.

II. ISSUES ON APPEAL

1. Did the circuit court err in finding the facts of this case did not establish the existence of "property damage" under the policy?
2. Did the circuit court err in failing to find an "occurrence" under the policy?
3. Did the circuit court err in broadly construing one of the policy's exclusions to defeat coverage?
4. Did the circuit court err in narrowly construing the policy against coverage?

III. STANDARD OF REVIEW

"The standard of review in a declaratory action is determined by the underlying issues." *Nationwide Mut. Ins. Co. v. Rhoden*, 398 S.C. 393, 398, 728 S.E.2d 477, 479 (2012). If the dispute is an action to determine whether coverage exists under an insurance policy, the action is one at law. *Id.* In an action at law, tried without a jury, the appellate court will not disturb the trial court's findings of fact unless they are found to be without evidence that reasonably supports those findings. *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976).

IV. LAW/ANALYSIS

1. "Your Work" Exclusion

Precision argues the trial court erred in finding the "your work" exclusion applied to bar coverage. Assuming without deciding that there was "property damage" caused by an "occurrence," we find the "your work" exclusion barred coverage.

"The standard CGL policy grants the insured broad liability coverage for property damage and bodily injury which is then narrowed by a number of exclusions." *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009). The exclusions must be independently read and applied. *Id.*

The trial court found "[e]ven if the losses claimed by Precision Walls were found to be within the terms of the insuring agreement, there would be no coverage because the losses are excluded" by the "your work" exclusion. The trial court relied on a "virtually identical" exclusion in *Century Indemnity Co. v. Golden Hills Builders, Inc.*, 348 S.C. 559, 561 S.E.2d 355 (2002), *overruled on other grounds by Crossmann Communities of North Carolina, Inc. v. Harleysville Mutual Insurance Co.*, 395 S.C. 40, 45, 717 S.E.2d 589, 591 (2011).

In *Golden Hills*, the United States Fourth Circuit Court of Appeals certified coverage questions to our supreme court. *Id.* at 561, 561 S.E.2d at 356. Homeowners alleged defective stucco caused moisture damage to their properly constructed substrate and framing. *Id.* at 562, 561 S.E.2d at 356. The general contractor was insured under a CGL policy with coverage for "property damage" caused by an "occurrence." *Id.* at 563, 561 S.E.2d at 357. The parties stipulated to "property damage" caused by an "occurrence." *Id.* at 563–64, 561 S.E.2d at 357. However, one of the certified questions in *Golden Hills* considered whether the "your work" exclusion applied. *Id.* at 565, 561 S.E.2d at 358.

Homeowners maintained the exclusion should be interpreted as excluding only repairs to the stucco, which was incorrectly installed, arguing repairs to other property (the substrate and substructure) should not be excluded. *Id.* at 566, 561 S.E.2d at 358–59. The court disagreed, finding the "your work" exclusion applied given the purpose of CGL policies, which is to cover risks of liability but not to

insure normal, frequent, or predictable consequences of doing business. *See id.* at 566–67, 561 S.E.2d at 358–59 (providing the "your work" exclusion excluded coverage not only for (1) "property damage" to defective work caused by that defective work but also for (2) "property damage" to non-defective work caused by the defective work).

The "your work" exclusion in *Walde v. Association Insurance Co.*, 401 S.C. 431, 445–46, 737 S.E.2d 631, 638–39 (Ct. App. 2012), *petition for cert. filed*, (S.C. Apr. 12, 2013), was also similar to the exclusion in this case. In *Walde*, the property owners, the Waldes, began construction of a barn and paddock for their horses. *Id.* at 435, 737 S.E.2d at 633. The structure included an apartment. *Id.* at 436, 737 S.E.2d at 633. The Waldes' builder assured the Waldes he obtained the proper variance from the Aiken Board of Zoning Appeals (the Board). *Id.* After the builder completed 80% of the building, the building inspector notified the builder that the barn did not comply with the variance requirement and was not a special exception. *Id.* The Board required the Waldes to remove the apartment from the structure. *Id.* at 436, 737 S.E.2d at 634. After the partial demolition of the structure, the Waldes filed claims against the builder. *Id.* at 437, 737 S.E.2d at 634. Association Insurance Company (AIC) insured the builder under a CGL policy. *Id.* at 438, 737 S.E.2d at 634. This court found that although the Waldes "successfully raised the possibility of 'property damage' caused by an 'occurrence'" under the policy, the exclusion barred coverage for the Waldes' economic losses and loss of use of the barn due to the builder's negligence in the permitting process. *Id.* at 447–48, 737 S.E.2d at 639.

More recently, the supreme court, in a divided opinion, found a "your work" exclusion applied in *Bennett & Bennett Construction, Inc. v. Auto Owners Insurance Co.*, 405 S.C. 1, 747 S.E.2d 426 (2013). In *Bennett*, a homeowner hired a contractor to remove stucco cladding from her home and replace it with decorative brick. 405 S.C. at 3, 747 S.E.2d at 427. The contractor hired a brick installer to install the brick and instructed the subcontractor not to pressure wash or acid wash the brick. *Id.* The brick installer hired a brick cleaner to clean the brick. *Id.* The brick cleaner damaged the brick by using a pressure washer and acid solution. *Id.* After the brick installer refused the general contractor's request to remove and replace the brick, the general contractor replaced the brick at its own expense. *Id.* The general contractor filed an action against the brick installer for breach of contract and obtained a default judgment. *Id.* at 3–4, 747 S.E.2d at 427.

The general contractor next sought a declaratory judgment under the brick installer's CGL policy for coverage for the damages. *Id.* at 4, 747 S.E.2d at 427.

Our supreme court first found exclusion j(5) applied, which barred coverage for "property damage to [t]hat particular part of real property on which you or any contractors or subcontractors . . . are performing operations, if the 'property damage' arises out of those operations. . . ." *Id.* at 5, 747 S.E.2d at 428. The supreme court found the damages arose out of the operations performed by the insured or its subcontractor (here, the second subcontractor). *Id.* at 7, 747 S.E.2d at 429. Thus, the court found exclusion j(5) "unambiguously exclude[d] coverage when the insured's subcontractor damages the work product while performing operations, regardless of whether 'your work' is complete under the policy" *Id.*

"Although unnecessary to [its] analysis[.]" the supreme court also found exclusion n, a "your work" exclusion, applied to defeat coverage. *Id.* at 7–8, 747 S.E.2d at 429. Exclusion n applied to damages for any loss or expense incurred to repair or replace "your work" if such work was withdrawn from use due to a known or suspected defect. *Id.* at 8, 747 S.E.2d at 429. The court found the brick face was replaced because of a deficiency or inadequacy; thus, coverage was barred under exclusion n. *Id.* at 8, 747 S.E.2d at 430. The court concluded, "As we have . . . repeatedly explained, a CGL policy does not insure the insured's work itself but consequential risks that stem from the insured's work." *Id.*

We find the "your work" exclusion applies in this case. The exclusion applies to property that must be restored, repaired, or replaced. The exclusion specifically includes materials furnished in connection with such work. Here, the contract between SYS and Precision required Precision to "correct the affected work and all costs incurred as the result of [a] breach of warranty" We find the defective tape, and all costs associated with its replacement, fall squarely within the exclusion.

2. Construction of the Policy

Precision also argues the trial court erred in narrowly construing the policy to defeat coverage. We disagree.

"An insurance policy is a contract between the insured and the insurance company, and the terms of the policy are to be construed according to contract law." *Auto Owners Ins. Co. v. Rollison*, 378 S.C. 600, 606, 663 S.E.2d 484, 487 (2008) (citation omitted). The court must give policy language its plain, ordinary, and popular meaning. *Pres. Capital Consultants, LLC v. First Am. Title Ins. Co.*, 406 S.C. 309, 316, 751 S.E.2d 256, 259 (2013). The court must construe ambiguous terms in an insurance policy liberally in favor of the insured and strictly against the insurer. *Stringer v. State Farm Mut. Auto. Ins. Co.*, 386 S.C. 188, 192, 687 S.E.2d 58, 60 (Ct. App. 2009). "[I]n cases where there is no ambiguity, contracts of insurance, like other contracts, must be construed according to the terms which the parties have used, to be taken and understood in their plain, ordinary and popular sense." *Id.* (quoting *Garrett v. Pilot Life Ins. Co.*, 241 S.C. 299, 304, 128 S.E.2d 171, 174 (1962)). "The court cannot torture the meaning of policy language to extend coverage not intended by the parties." *S.C. Farm Bureau Mut. Ins. Co. v. Dawsey*, 371 S.C. 353, 356, 638 S.E.2d 103, 105 (Ct. App. 2006) (citing *State Farm Fire & Cas. Co. v. Barrett*, 340 S.C. 1, 8, 530 S.E.2d 132, 135 (Ct. App. 2000)).

We find there was no ambiguity in the policy terms at issue; thus, the trial court was not required to construe the terms in favor of Precision. Rather, the trial court appropriately construed the relevant policy terms according to their plain and ordinary meaning. We find no error in the trial court's construction of the policy.

3. Remaining Issues

Based on our disposition of Precision's challenges to the "your work" exclusion and the trial court's construction of the policy, we need not address Precision's remaining challenges to the trial court's findings regarding "property damage" and "occurrence." See *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (holding an appellate court need not review remaining issues when its determination of another issue is dispositive of the appeal).

V. CONCLUSION

For the foregoing reasons, the order on appeal is

AFFIRMED.

FEW, C.J., and GEATHERS, J., concur.

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

RECEIVED

AUG 05 2014

SC Court of Appeals

Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

APPELLANT'S PETITION FOR REHEARING

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August 5, 2014

APPX 0463

STATEMENT OF ISSUES ON REHEARING

- I. BECAUSE PRECISION WALLS PERFORMED NO WORK AT ALL ON THE DAMAGED PROPERTY, THE COURT MISAPPLIED THE POLICY'S "YOUR WORK" EXCLUSION, WHICH APPLIES ONLY WHERE THE INSURED'S WORK HAS BEEN INCORRECTLY PERFORMED ON THAT PARTICULAR PART OF THE PROPERTY SUFFERING DAMAGE.
- II. PRECISION WALLS' REMAINING ISSUES ON APPEAL, WHICH THE COURT DECLINED TO REACH, SHOULD BE ADDRESSED ON REHEARING.¹
 - A. Whether the Trial Court erred in finding that tearing down a brick veneer wall was not "physical injury to tangible property" so as to constitute "property damage" as that term is defined in the insurance policy?
 - B. Whether the Trial Court erred in finding that in the absence of any evidence of negligent or faulty workmanship by the insured, the loss of adhesion of the insulation joint tape was not an "accident" so as to constitute an "occurrence" as that term is defined in the insurance policy?

REQUEST FOR REHEARING

Pursuant to Rules 221 and 240, SCACR, Appellant Precision Walls, Inc. respectfully petitions this Court to rehear this appeal. As set forth below, grounds for rehearing exist as there are particular factual and legal points which this Court has overlooked, misconstrued or misapprehended in issuing its ruling filed on July 23, 2014 (Opinion No. 5250).

¹ Precision Walls incorporates herein by reference the arguments set forth in its briefs on these issues.

ARGUMENT

- I. In holding that the insurance policy's "Your Work" exclusion applied, the Court misconstrued the plain language of the exclusion which applies only where the insured's work has been incorrectly performed on that particular part of the property suffering damage.

The policy exclusion at issue in this case, referred to by the Court as the "Your Work" exclusion, states as follows:

2. Exclusions

This insurance does not apply to:

- j. Damage to Property

"Property Damage" to:

(6) that particular part of any property that must be restored, repaired, or replaced because "your work" was incorrectly performed on it.

(Liberty Mutual Ex. 1—Section I—Coverages, part 2—Exclusions-subpart j; R. pp. 224-225)

In holding that the exclusion applied, the Court overlooked two critical parts of this exclusion. First, the exclusion only applies when the insured's work was incorrectly performed on the damaged property. Second, the exclusion is very specific in that it limits the application to that particular part of the damaged property on which the insured was performing its work. Under the facts of this case, it is impossible for either of these elements to be met.

In this case, the property that suffered damage and required restoration was the brick veneer wall. The brick veneer wall was constructed after Precision Walls installed the exterior insulation board and applied Seam and Seal tape to the joints, so Precision Walls's work was obviously not performed on the brick veneer wall itself. (Doherty Aff.; R. pp. 333-336) Therefore, because Precision Walls performed no work on that

particular part of the property that was damaged, the “Your Work” exclusion cannot apply. Under the facts of this case, to construe this exclusion otherwise would require ignoring its plain meaning and would further require a broad, expansive interpretation of the policy exclusion in favor of the insurer. Neither interpretation is a proper construction of an insurance policy exclusion. See *Walde v. Association Insurance Co.*, 401 S.C. 431, 439, 737 S.E.2d 631, 635 (Ct. App. 2012), quoting *M & M Corp. of S.C. v. Auto-Owners Ins. Co.*, 390 S.C. 255, 259, 701 S.E.2d 33, 35 (2010)(“[p]olicies are construed in favor of coverage, and exclusions in an insurance policy are construed against the insurer.”)

A. The cases cited by the Court are readily distinguishable from Precision Walls’ claim for coverage.

1. *Century Indemnity Co. v. Golden Hills Builders*

The Court cites *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002), as being instructive on the issue of whether policy exclusion “j(6),” referred to by the Court as the “Your Work” exclusion, bars coverage. The Court’s reliance on *Golden Hills* is misplaced in two respects. First, the continuing validity of *Golden Hills* is in doubt after the South Carolina Supreme Court’s opinion in *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 717 S.E.2d 589 (2011), where the court overruled *Golden Hills* without limitation. Second, *Golden Hills* cannot be reconciled with the more recent case of *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 684 S.E.2d 541 (2009). In *Newman*, the South Carolina Supreme Court held that property damage to the framing and exterior sheathing behind an improperly installed synthetic stucco exterior was a covered loss under the CGL policy. *Id.* In stark contrast, under an almost identical factual scenario, the South

Carolina Supreme Court held in *Golden Hills* that the GCL policy did not cover damage to the home's substrate and framing caused by an improperly installed synthetic stucco exterior. This discrepancy was resolved in *Crossman* when the court stated that it "elected to adhere to our precedent in *Newman*." *Crossmann Communities of N. Carolina, Inc. v. Harleysville Mut. Ins. Co.*, 395 S.C. 40, 50, 717 S.E.2d 589, 594, n.6 (2011). Therefore, it would appear that *Golden Hills* has little to no precedential value after *Newman* and *Crossman*.

Even if there is any continuing validity to the analysis in *Golden Hills*, the facts in this case are very different than those in that case. *Golden Hills* involved a synthetic stucco exterior incorrectly installed on exterior framing and substrate. See *Century Indemnity Company v. Golden Hills Builders*, 348 S.C. 559, 561 S.E.2d 355 (2002). Here, the exact opposite situation is presented. The brick veneer wall had to be torn down, not because Precision Walls's work had been performed on it, but because it had to be removed in order for Precision Walls to have access to repair its own defective work. Moreover, there is no evidence in this case that Precision Walls incorrectly or improperly performed its work with respect to applying the joint tape to the exterior insulation boards. Instead, the record in this case strongly supports the conclusion that the joint tape's loss of adhesion was caused by a defect with the tape itself rather than the workmanship of Precision Walls in installing the tape.

2. *Walde v. Association Insurance Co.*

The Court also cited its recent opinion in *Walde v. Association Insurance Co.*, 401 S.C. 431, 737 S.E.2d 631 (Ct. App. 2012), as support for its finding that Precision

Walls's claim is barred by policy exclusion "(j)(6)."² This Court held in *Walde* that the "(j)(6)" policy exclusion applied to bar coverage because the property damage was to that particular part of the property on which the insured incorrectly performed its work. *Walde*, 401 S.C. at 447, 737 S.E.2d at 639. In *Walde*, the property damage that had to be replaced (i.e. the walls and roof of the offending upstairs apartment) was the insured's own work. The *Walde* court found that the property damage was excluded by policy exclusion "(j)(6)" because it constituted "that particular part of property that must be replaced because [the insured's] permitting work was incorrectly performed on it." *Id.* However, in this instance, because Precision Walls performed no work on the brick veneer wall (i.e. the property damage) which was installed after Precision Walls had already performed its relevant work, the "(j)(6)" exclusion cannot apply. Therefore, *Walde*'s analysis simply does not apply to the unique facts of this case.

3. *Bennett & Bennett Const., Inc. v. Auto Owners*

In *Bennett & Bennett Const., Inc. v. Auto Owners Ins. Co.*, 405 S.C. 1, 747 S.E.2d 426 (2013), the South Carolina Supreme Court addressed policy exclusions different from the one at issue in this case. Therefore, the reasoning of the court in *Bennett* as to the application of those different exclusions is of no assistance in determining the application of the exclusion at issue here. See *Auto Owners Ins. Co. v. Newman*, 385 S.C. 187, 197, 684 S.E.2d 541, 546 (2009) citing *Engineered Products, Inc. v. Aetna Cas. & Sur. Co.*, 295 S.C. 375, 378–79, 368 S.E.2d 674, 675–76 (Ct.App.1988) ("Each exclusion in the policy must be read and applied independently of every other exclusion.") Moreover, as to the "(j)(5)" exclusion addressed by the court in *Bennett*, the application of

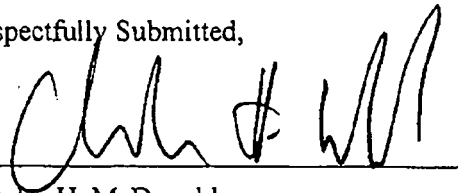
² The South Carolina Supreme Court recently granted the Waldes' petition for writ of certiorari on June 25, 2014.

that exclusion likewise requires that the insured have been performing operations on that particular part of the property suffering damage. *Id.*, 405 S.C. at 5, 747 S.E. 2d at 428. As set forth above, that is not the case in this instance.

CONCLUSION

For the reasons set forth above, Precision Walls petitions the Court to vacate its opinion and to issue a new opinion addressing all of the issues raised by Precision Walls on appeal. Precision Walls seeks a reversal of the ruling of the trial court and remand for a determination of whether an "occurrence" caused the "property damage" in question, triggering the claimed coverage under the CGL policy.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'CH McDonald', is written over a horizontal line.

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THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Letitia H. Verdin, Circuit Court Judge

Case No. 2011-CP-23-02028

RECEIVED

AUG 05 2014

SC Court of Appeals

Precision Walls, Inc. Appellant,

v.

Liberty Mutual Fire Insurance Co. Respondent.

PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing by having a copy hand-delivered to the Respondent's attorney of record, Steven Wayne Ouzts, Turner, Padgett, Graham & Laney, P.A., Bank of America Plaza, 1901 Main Street, 17th Floor, Columbia, SC, 29201.


Rebecca H. Schwind
Paralegal to Charles H. McDonald

August 5, 2014

APPX 0470

The South Carolina Court of Appeals

Precision Walls, Inc., Appellant,

v.

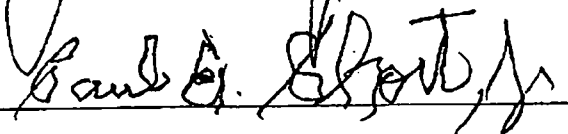
Liberty Mutual Fire Insurance Co., Respondent.

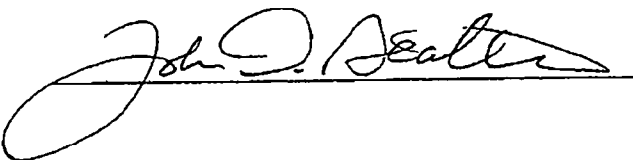
Appellate Case No. 2013-000787

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

 C.J.

 J.

 J.

Columbia, South Carolina

cc:

Charles Harry McDonald, Esquire

Steven Wayne Ouzts, Esquire

The Honorable Letitia H. Verdin

FILED

October 23, 2014
VCA